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Lect. Dr. Adrian CORPĂDEAN: adi_corpadean@yahoo.com

Dr. Horațiu DAN: dan.horatiu.sorin@gmail.com

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CONTENTS

- I. Lucian BOGDAN: HUMAN FLOURISHING, LIBERTY AND DEVELOPMENT IN THE POLITICAL THOUGHT OF ADAM SMITH AND AYN RAND**
- II. Gabriel C. GHERASIM: TRANSATLANTIC NIETZSCHE**
- III. Marius JUCAN: BETWEEN RESISTANT PASTS AND UNSETTLED FUTURES, IS THERE A PRESENT FOR TRANSATLANTIC RELATIONS?**
- IV. Doina MICU: SIMILARITIES AND DIFFERENCES IN TRANSATLANTIC LEGAL HARMONY: THE PARADIGM OF AMERICAN AND EUROPEAN CONSISTENCY OF THE LAWS IN HUMAN RIGHTS AREA**
- V. Raluca MOLDOVAN: HOLLYWOOD'S WAR ON TERROR IN THE POST 9/11 WORLD**
- VI. Valentin NAUMESCU: THE EUROPEAN UNION AND THE UNITED STATES' STRATEGIC APPROACHES ON THE UKRAINIAN CRISIS: A NEW CLEAVAGE IN THE TRANSATLANTIC RELATIONS?**
- VII. Titus POENARU: BRIDGING THE TRANSATLANTIC PRIVACY DIVIDE**
- VIII. Șerban VĂEȚIȘI: GLOBAL DEVELOPMENTS AND LOCAL COMMUNITIES. TOWARD A POST-DEVELOPMENTAL PARADIGM OF TRANSATLANTIC STUDIES**

HUMAN FLOURISHING, LIBERTY AND DEVELOPMENT IN THE POLITICAL THOUGHT OF ADAM SMITH AND AYN RAND

Dr. Lucian Bogdan
Babeş-Bolyai University, Cluj-Napoca, Romania
blucian07@yahoo.com

Abstract: *Adam Smith was the first ever to counter the mercantilist approach to enrichment as a zero-sum game, arguing that trade can lead to mutual gains and that the greater the degree of the freedom to trade, the greater the gains. Ayn Rand's more radical approach demonstrates - in what sometimes constitutes a shocking manner - that even when a deal looks totally off balance, it still can yield benefits for the underdog of the transaction. Our study shall investigate the positions of both thinkers and of the currents of political thought they stand for, respectively, classical liberalism and objectivism, in what concerns the liberties a society needs to safeguard in order to assure the greatest possible degree of development, both at the macroeconomic level and at that of its citizens' every days' lives. While two centuries separate Adam Smith and Ayn Rand, there are more parallels between their doctrinaire positions than one might think at a first glance. We shall elaborate upon the subject, identifying these elements and pointing out which contribute more to fostering human flourishing and - generally - development.*

Keywords: capitalism, development, human flourishing, entrepreneurship, trade

1. Fallacies and limitations of the socialist utopia

The industrial revolution caused, beyond the inevitable transformations in technology, numerous social changes. Thus, gradually, aristocrats were removed from office (though, in many European countries they would still retain a honorary position in society, albeit devoid of political power).

Their uppermost ranking on the social pyramid was, within a handful of generations, taken by the bourgeoisie (a process which started with the revolution of Cromwell (1642-49) and continued throughout the 18th century, this transition reaching its end in the years of the American Civil War. The latter can be regarded, in practice, as a confrontation between an economic system based on free initiative and equality, and one based on racial oppression by an elite of a neo-feudal structure (McDougall 2009).

Let us note that changes were far from here: small workshops, where a skillful craftsman worked side by side with his apprentices, would remain into the footnotes

history, or more precisely, would be sidelined towards niche areas, such as the manufacture of luxury products, in limited series. The ever-growing needs of the population would be quelled by specialized factories, churning out standardized products, endlessly multiplied on the assembly line.

This process would determine a rebalancing of the entire social fabric: capital would accumulate to an ever-increasing rate into the hands of the entrepreneurs, and easily-replaceable employees (having become so as a result of the constant reduction in complexity of tasks, each employee having to perform only a fraction of the production process) would have to content themselves with a minimum level of remuneration - phenomenon which would lead, in a shorter-than-expected time span, to social tensions.

Under these circumstances, one should not be surprised by the emergence, in February 1848, of Karl Marx and Friedrich Engels' *Communist Manifesto*. However, before analyzing its doctrinaire fundamentals and their limits, let us remember that, although at present the aforementioned writing of Marx and Engels is regarded as the founding document of communism, the authorship of the term “Communist” dates back to 1839, when the French writer Étienne Cabet, who dreamt of creating an egalitarian society model.

Cabet was hoping to export his utopia to the U.S., in a roughly similar manner as that of Marquis de La Fayette, who exported the cause of the French Revolution to the New World (although, let us not forget a slight historical inaccuracy: the involvement of France in the American revolutionary war was determined strictly by the geopolitical interest of counterbalancing the leverage of England; back in 1776, France was still a relatively stable absolutist monarchy; on the contrary, it would be the success of the rebels from the colonies that fueled the appetite for spreading revolutionary ideas on the old Continent).

Cabet, along with 150 of his followers, would cross the Atlantic, establishing the egalitarian society titled “The Icarians”. Founded in New Orleans, it would spread to the Midwest and California (interestingly, it failed to gather any adherents on the industrious East Coast). Their communities, numbering up to several hundred members, would survive up to as much as five decades, the last one dissolving itself 1898.

The Icarians defined themselves as “a real, genuine society in which all its members are associate and acting jointly for their common interest. And this Community Association is based on popular sovereignty, freedom, equality, brotherhood and unity” (Cabet 1843).

Cabet goes on to evoke equality as the cornerstone of society, “but it's not equal and absolute, but equal in proportion to the needs and the means: equality in rights and duties, real equality. Equality in all: in education, food, clothing, housing, the ability to get married; employment, eligibility for public functions, etc.”.

We cannot help to observe the manifest inspiration of Cabet from the programmatic ideals of the French revolution of 1789, seasoned with elements of Communist utopia (for, let us not forget, communism was in the first instance an intellectual utopia, long before becoming a criminal regime, of leaders such as Stalin, Pol Pot or Honnecker).

However, the Icarians obviously lacked the fundamentals for their utopian program: if programmatically, everything appears as almost too good to be true - especially for the most disadvantaged strata of society, which struggled in abject poverty, while they witnessed the capitalists enriching themselves literally overnight - the main problem, whether we speak of the Communist utopias of the 19th century, or the “welfare state” systems developed after the Second World War, is constituted by the source of funding.

It is possible, of course, to imagine the establishment of egalitarian societies, by the more or less forced stripping away of the goods of some of its members, in order to achieve universal equality (we don't necessarily mean the strict, despotic measures such as the setup of kolhoz-like public exploitations, but, more generally speaking, redistributive measures, as are the excessive taxes, which constitute a constant practice in social democracies).

It is more problematic, if not impossible, for everyone to reach equality in prosperity and not to become equally poor (to paraphrase the expression of Alexis de Tocqueville, in fact, societies - as the despotism in North Korea - prove that this is the final stage of the Communist utopia: equality in servitude and poverty, alike).

For the above mentioned reasons, we may infer that, however seductive the Communist utopia may be in the intellectual sphere, it should remain confined under the

glass dome of the academia, were mankind not to undergo the horrors of the Eastern Europe of the early 1950's.

Diametrically opposed to the communist utopia stands yet another intellectual movement, namely the objectivists, who raise on the pedestal of the society the figure of the entrepreneur, the man sporting initiative, both in the realm of technology and in that of business; the entrepreneur is the only force capable of driving humanity forward on the path of progress.

2. Adam Smith and the fundamentals of free trade, liberty and their benefits

As early as 1759, Adam Smith gave utterance to what would become known as the “invisible hand” thesis. In his seminal work, *A Theory of Moral Sentiments*, the Scottish Economist scrutinizes the distribution of wealth in society, which is not necessary to be carried out by means of an arbitrary, despotic authority, as was the case in the feudal societies and the socialists claim it is needed, but thanks to the internal market mechanisms, which will be taking care to ensure the best and most efficient possible distribution of resources. Thus, the market itself is the one who “knows” most closely the needs and available means for each individual, and therefore prods them to allocate priorities accordingly.

The same year the Declaration of Independence was proclaimed in what would become known as the United States, Adam Smith would publish a more thorough refinement of his thesis, in a two-volume work, titled *An Inquiry Into the Nature and Causes of the Wealth of Nations*. The editors from the Liberty Fund, issuers of the current edition, underline that Smith was not only one of the main representatives of the movement which became known as the Scottish Enlightenment, but can be considered, thanks to the publication of *The Wealth of Nations*, as the first true modern economist.

This assertion is supported by Eamonn Butler, in his volume, *Adam Smith. A Primer* (2007), who identifies a series of ten theses of *The Wealth of Nations* - aspects which constitute, we may add, just as many reasons for which Adam Smith is still actual, after more than two centuries since the publishing of his works.

Let us linger, ever briefly, on every one of them:

1. The wealth of a nation is determined not inasmuch by the amount of gold it hoards in its treasury, but by the goods and services it produces and sells. At a time when mercantilism was still the dominant doctrine, Adam Smith was the first to highlight an aspect that mankind would understand fully only after about a couple of centuries: gold, though it was cherished as valuable ever since prehistory, is merely a commodity like any other (albeit imperishable).

Consequently, even someone owning an impressive amount of gold will need to find a business partner, to provide him with goods and services that he needs, in exchange for the appropriate amount of gold. (Let us note that the process of waiving the gold standard began at the Bretton Woods Convention of 1944, and would be completed as late as 1971, when Richard Nixon unilaterally waived the international convertibility of the dollar into gold, in order to stabilize the budget deficit and reduce unemployment, as part of the program known as his *new economic policy* (vid. “Richard M. Nixon. Domestic Policies”).

2. In a system based on free exchange, both partners of the transaction have something to win. Not only that “nobody would enter into a transaction if we knew that he were losing it”, as Butler points out (aspect which one may correlate with the legal principle of unjust enrichment, which assumes that each contracting party should receive a benefit of equal value with the one which she conceded herself), but it is even possible that, at the end of the contract period, both participants to be more wealthy than if they had not engaged themselves in trading and would have only relied on their own resources to realize that thing (this being the idea at the basis of competitive advantage, a thesis further developed in Section 4).

3. Over-regulation is doing more harm than good to commercial activity; equally, the fiscal regime threatens prosperity, just as protectionist laws and customs duties do (note here that Smith was a visionary, as he was highlighting exactly the same obstacles in the way of free trade against which the World Trade Organisation is struggling nowadays, with the backing of the Washington Consensus and the European Union).

4. Enhancing the productivity of a country is based upon specialization and the division of labor, in close correlation with the accumulation of capital. Thus, we can continue the reasoning of Smith and Butler, concluding that the Division of labor leads to

the optimization of production, each employee performing a reduced set of tasks, under optimal conditions.

This, in turn, leads to increased earnings for the employer (the one that divides its tasks among employees), earnings which will allow the entrepreneurs to develop their business even stronger. However, we should not limit ourselves to the perspective of a single company: let us note that currently, the development of outsourcing processes (known under the acronym BPO) takes place precisely because the whole company finds that it is better to specialize in that one thing which you do best, and to dispose of subcontractors — which, in turn, are specializing themselves in technology or auxiliary administrative processes.

And, as it is apparent in this era of globalization, outsourcing is not limited by national borders: subcontractors are often based in distant countries, but which have developed a strong telecommunications infrastructure (e.g. companies like Genpact, Emerson, Office Depot, where employees in Slovakia and Romania, or as far as India, have adapted their daily schedule so as to serve the American customers).

5. Capital accumulation leads to an enhancement of earnings at an incremental rate. Thus, not only will companies struggle for profit, but they will reinvest it; thus, in the longer run, wealth itself is going to generate more wealth.

An argument similar to that of Adam Smith was developed by Duncan McDougall in the 2009 edition of the *American Economy and Business* seminars. The American scholar highlighted that, currently, the New York Stock Exchange has reached values about 35 times higher than the maximum of the interwar years (of 381 points, reached in 1929). This happened precisely thanks to the constant build-up of assets, recorded by companies throughout the last eight decades (although, let us not forget, many of the original components of the Dow-Jones index have long become a footnote of economic history).

6. Freedom of trade and competition drive operators to satisfy the most stringent requirements of the market. Entrepreneurs, underlines Smith, will orient themselves towards the production of those things that people want to buy; increased demand will mean that they do not get sufficient amounts available for purchase, resulting in an increase in prices.

However, in case the economy is running normally, we will not come to bear witness to an inflationary spiral: the new, higher prices will make it profitable for more and more producers to enter the market. And, obviously, as soon as the requested product will be once again available in abundance, the price will come down once more. Thus does the internal mechanisms of self-regulation of the market, as if the “invisible hand” would intervene to re-settle things back towards normalcy.

7. In order for the invisible hand mechanism to function optimally, the coercive power of the state has to be minimally used, solely in order to maintain a climate of internal security and prevent the spreading of crime. This way, highlighted the Scottish economist, freedom does not lead to chaos and anarchy, but gradually leads towards the settlement of things according to their natural balance.

8. A systemic problem occurs when interest groups manipulate the government, to cause it to enact laws favorable only to their short-term benefit - and by limiting competition. Of course, let us note the applicable terminology did not exist in the days of Adam Smith, but we cannot help noticing once more his visionary spirit: basically, in case governments intervene, we no longer have to deal with a free market, but with a regulated market - which functions not just in order to satisfy the needs of the consumer, but also to observe the (more or less justified) requests of the authorities.

We may appreciate that Adam Smith predicted the same danger which, nearly two centuries later, Dwight Eisenhower would highlight in his farewell speech: the risk that the power may be exercised under apparently democratic mechanisms, yet not in the interest of the citizens, but in that of the “military-industrial complex”, that will legislate exclusively for the satisfaction of their own interests.

9. With respect to taxation, following the line of Adam Smith's argument, Eamon Butler proposed a fiscal system that should be “proportional to income, secure and convenient payment. Collected fees shall be inexpensive, desirable not to impede business, should not be so onerous as to encourage tax evasion and does not require frequent visits of the revenue [service]”.

Note that all the aforementioned substantive provisions are common-sensical, so that any politician of the present days should be aware of their existence and apply them to the fullest extent, in order to prevent his nation from turning into a kleptocracy.

10. However, Smith remains an optimist, arguing that humans have a natural “sympathy” towards their fellow men. Thus, in a similar manner, if left unhindered by the state, the forces on the market will have the tendency to seek natural harmony, stimulating responsible citizens and tempering reckless behavior and, basically, the merchants themselves will make the rules, creating an (unwritten) code of conduct that will govern their business lives.

We cannot fail to notice Smith's optimism, who envisioned a society devoid of what would become known as “criminal deviance” during the following century (vid. Cesare Lombroso 1878). Unfortunately, however, the mechanisms described by Adam Smith, relying upon individuals endowed with natural empathy, may not work precisely because of a small, yet powerful minority, for which rules exist only to be trampled upon. Consequently, it is necessary for society to devise a coercive mechanism - and from here to the loss of one's rights and freedoms as a citizen, there is but a very fragile border.

The aforementioned utterances of Adam Smith are certainly complemented by the ideas of the French economist Frederic Bastiat who, in his article titled “That Which Is Seen, and That Which Is Not Seen” (1848), elaborates on the idea that not everything that may seem as negative, as destructive in the immediate run, is necessarily a bad thing for the economy as a whole.

Thus, even a misdemeanor, such as breaking a window by too impish a child will bring forth numerous positive economic consequences: its replacement will require the work of many craftsmen that - obviously if the window had not been broken - wouldn't have anything to work at that time.

However, let us not forget the opinion expressed by urbanists on the same issues: thus, if in Karl Marx's view, graffiti represent a form of manifestation of workers, who utter their frustrations on the walls of factories - as these the only things their patrons could not sell - modern urbanists have noticed that in areas where the broken windows are not repaired and graffiti are not covered in fresh paint, as areas of severe social problems (vid. James Q. Wilson and George L. Kelling 1982).

Thus, where broken windows and graffiti sites persist and no one takes action to correct them, it is a sign that one enters a neighborhood where lawlessness can operate

unhindered. Consequently, offenders shall focus their activity in that specific area, which will become even less safe for the rest of the citizens.

Beyond these technicalities, however, we cannot but appreciate the merits of Adam Smith, who was the first to theorize the essence of modern capitalist society, at a time when, let us not forget, the transformation of society were but in their inception (as, back in 1776, the industrial revolution was barely beginning - Watt's steam engine had barely been invented, a year before, the merchants of New York met under a buttonwood (and the eponymous agreement, which lay the foundations of the New York Stock Exchange was concluded only in 1792), and the global telecommunications were still something of the imaginary (the first transatlantic telegraph cable would only be installed as late as 1858)).

3. Taking liberty a (radical) step further. Ayn Rand and the objectivist movement

However seductive the Communist utopia in the intellectual sphere, only by confining, it will mankind be able to thrive. Let us therefore shift our attention towards a diametrically opposed intellectual position, namely that of the objectivist movement, which raises on a pedestal the figure of the entrepreneur, the businessman sporting initiative and dynamism, both in the realm of technology and in that of negotiation, as this type of human is the only one able to push humanity forward on the path of progress.

The main thesis of objectivism, as set out by Ayn Rand in her philosophical novel, *Atlas Shrugged* (1957), is that the entrepreneur, the businessman showing initiative, is the one that ensures social progress, even though he is most often criticized and ostracized by society, everybody trying to shun him as nothing more than a profiteer.

The objectivist philosopher would go so far as to provide a clear-cut example, obviously exaggerated in a literary manner, yet otherwise as realistic as possible: a businessman, considered as infallible, desiring to cause his main competitors to lose large amounts of money, will himself make an unprofitable investment, thus luring them to take unnecessary risks at the wrong time. Her line of argumentation states that since “<it's evil to be selfish> as a profiteer, and when you do not follow the profit, you are not selfish,

means that such an initiative is not such as to be regarded as evil” (Chapter VII, “The Non-Commercial”).

Another example provided in the novel, what may seem somehow forced, but at the same time is indicative for the limit up to which contracting parties may go to into a negotiation, is that of the creator of a revolutionary metal, that would significantly increase the profitability of rail carriers. In these circumstances, the contractor was accused to planning “to rip off the public [...in the direction of maximizing] profit”.

The fact that he himself had to ask for a price three times higher than it would cost to produce the metal charges under scrutiny did not constitute a problem, while others were aware that, even at these high prices, the new product was to serve them the best interests - and represented, in the end, “a godsend” for them, even at the inflated prices (Chapter VIII, “The John Galt Line”).

In other words, what we must underscore is that in the vision of Ayn Rand, the business world, although it may seem immoral on numerous occasions, behaves perfectly rationally - or, at least, the most successful businesses are rational beings, knowing when to pay extra for something that will bring them significantly higher profits.

Another aspect of paramount importance for a free economy is the objectivist vision concerning money. Thus, Ayn Rand disputes the terms under which money would be shunned as the “root of all evil”, as alleged by presumably-disinterested moralists. On the contrary, she eloquently argues,

“So you think that money is the root of all evil? [...] Have you ever asked what is the root of money? Money is a tool of exchange, which can’t exist unless there are goods produced and men able to produce them. Money is the material shape of the principle that men who wish to deal with one another must deal by trade and give value for value. Money is not the tool of the moochers, who claim your product by tears, or of the looters, who take it from you by force. Money is made possible only by the men who produce. Is this what you consider evil?” (Chapter II, “The Aristocracy of Pull”).

Further on, Ayn Rand would point out a principle in force since as early as the times of the medieval *lex mercatoria*: the fact that coin, as the monetary standard, is based on the existing trust relationships in the society: the vendor accepts to part with his

property, with the certainty that he will be able to use the money he receives, in exchange for buying, at his turn, the supplies needed from those who produce them.

Or, to quote the wording of Atlas Shrugged, “Your wallet is your statement of hope that somewhere in the world around you there are men who will not default on that moral principle which is the root of money [*do ut des*, n.a.]. Is this what you consider evil?”

The culminating point of Ayn Rand's volume is but a genuine praise for the entrepreneur, which the author sees as a titan of the modern age:

“<- If you saw Atlas, the giant who holds the world on his shoulders, if you saw that he stood, blood running down his chest, his knees buckling, his arms trembling but still trying to hold the world aloft with the last of his strength, and the greater his effort the heavier the world bore down upon his shoulders-what would you tell him to do?>

- <I . . . don't know. What . . . could he do? What would you tell him?>

- <To shrug.>“.

In other words, the capitalist entrepreneur, the person showing most initiative, is the one who takes the blame for the state of decay of humanity (the Ayn Rand context imagined is that of a continuation of the Great Depression, to the point at which nobody produces anything any longer and civilization decays gradually, because nobody has the initiative to innovate and to engage in business, entrepreneurs being accused that it would be immoral and they would enrich themselves to the detriment of others).

On the contrary, underscores the objectivist philosopher, the entrepreneur is the only one able to jumpstart development and to re-settle the world on the path towards prosperity (as illustrates by the characters of Dagny Taggart and Hank Rearden from the novel) - and a revolt of the entrepreneurs, who would retire from doing business because they are shunned by society, would constitute the most appropriate alarm signal that things have gone too much astray.

Therefore, we may infer that the philosophical system of Ayn Rand (continued in theoretical volumes of non-fiction, *The Virtue of Selfishness* (1964) and *Capitalism: the Unknown Ideal* (1967)) represents a continuation and a further refinement of the laissez-faire principles of classical liberalism, the central idea being that the entrepreneur should not be embarrassed by the state and shunned by society, but, on the contrary, she argued

that businessmen are actually the main force generating prosperity, even for those apparently unrelated to their endeavors.

However, if the main shortcoming of the communist utopia is the failure to identify a sustainable source of funding for the generous programs of the egalitarian society, in the case of objectivism, the problem arises precisely from the idealization of the entrepreneur. If all men were angels, there would be no need for the state authorities - to paraphrase on the American Federalists.

More specifically, the adepts of objectivism assume that all entrepreneurs, although materialistic and profit-seeking by their very nature, would behave with a maximum of deference and would scrupulously observe the laws and regulations of safety at work. Unfortunately, however, it is often that the very race after ever-growing profits incites them to behave like “robber-barons”, rather than as Atlas-es of the modern world.

4. Concluding remarks. A brief reflection upon the role of the state in a free world

It is under these circumstances that the state should intervene, as an enforcer and organ of legality, so that economic life must be carried out according to the principles of free competition and the maximizing of profits, but still in compliance with the laws in force and with the observance of the safety standards, both for employees and for end consumers.

While it is true that the self-selectioning process, determined by the “invisible hand”, can lead to a gradual improvement of things, by weeding out the unscrupulous, dishonest profiteers who try selling non-conforming products and are not concerned with the safety of employees at work, but it would take far too much time and consequences for the citizen would be harsher than expected in the absence of clear rules in this area.

Beyond that, it is manifest that communism and objectivism remain extreme ideological positions: while both cover the relationship of the individual with the society in which he lives and the way wealth is redistributed (or, on the contrary, it not). It is no doubt, however, that this never-ending debate will continue, and a convergence between systems, such as that contemplated by de Gaulle, can only be of limited success.

We may however appreciate that since it promotes a greater degree of freedom, the objectivist position, in a well-established legal framework and with the appropriate means of enforcement, is the one that allows the fastest development of both a company and that of society at large.

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TRANSATLANTIC NIETZSCHE

Dr. Gabriel C. Gherasim

Lecturer

Babeş-Bolyai University, Cluj-Napoca, Romania

ggherasim@euro.ubbcluj.ro

Abstract: *Since the death of Friedrich Nietzsche, important philosophical movements and isolated intellectuals have been striving to understand, analyze, interpret, clarify, and sometimes to ideologize his controversial, perplexing and esoteric philosophy. The case of what I would call 'transatlantic Nietzsche' is but one of the multi-faceted readings of the German philosopher's works, standing for the ways in which Nietzsche was 'transported' across the Atlantic. The aim of the present paper is rather modest in surveying the complicated 'intellectual routes' linking the European Nietzsche and the American cultural and intellectual traditions, nor it explains why Nietzsche was so popular in the United States; instead, by commenting upon one of the most accurate and unbiased views on his philosophy, this study aims at explaining what themes were pervasively seductive for American philosophers and cultural critics, contributing in this way to a superior understanding of the relevant connections between Nietzsche and his American followers, be they sympathizers or detractors.*

Keywords: Nietzsche, Danto, psychologism, perspectivism, nihilism

Introduction

One of the most enduring reasons for defending the legitimacy of the syntagm 'transatlantic relations' results from testing its veracity in various fields in which one may find its usage, resourcefulness and necessary connections. Beyond all those considerations insisting on certain truisms, such as the common cultural and intellectual legacy or the undeniable social and economic shared practices between Europeans and Americans, there are peculiar affinities, bridges of communication and crossing arguments stating for the rationality of various transatlantic exchanges; philosophical traditions and ideas are relevant exemplifications for the multifaceted ways of transatlantic relations.

An intricate, pluralistic and not at all uncontroversial case of 'transatlantism' is Nietzsche. On what grounds is it possible to claim that the 'transatlantic Nietzsche' is

illustrative for assessing the deep connections between European and American philosophy and culture in the 20th century? How important was Nietzsche in America? How should his posterity and influence be assessed? Were his ideas harmful and/or inspirational for the prevailing mentalities, cultural trends and philosophical orientations in the United States? And, moreover, how was he understood? An exhaustive narrative on such complicated questions is likely impossible; instead, arguing for what I called a ‘transatlantic Nietzsche’ would be convincing only by approaching specific concepts and non-speculative dialogues between the German philosopher and his followers. On the other hand, it is also relevant to investigate the way in which American intellectuals influenced Nietzsche whatsoever.

As far as the last issue is concerned, there is little evidence that American intellectuals caught Nietzsche’s attention, with the notable exception of Emerson, who seemed to be the first philosophical akin spirit and educator, especially in his youth, around 1865 (Brobjer 2008; Ratner-Rosenhagen 2012a). In this respect, one can rather grasp common traits of *modus vivendi* and *modus cognoscendi* than conceptual and thematic cross-fertilizations, as Nietzsche remained deeply attached to European traditional philosophy, not in the sense of adhering to them but to harshly criticize and denounce its metaphysical presuppositions. As far as Nietzsche’s influence in the United States is concerned, there has been a constant and encompassing preoccupation of American intellectuals with his thinking and works; various scholars and exegetes have argued on several waves of the German philosopher’s influence on outstanding American intellectuals. Starting with some minor research of doctoral students in America at the end of the 19th century, in the time of Nietzsche’s life and, prior to World War I, with what I would deem as ‘proto-nietzscheanism’ in America (George Burman Foster and Benjamin Tucker) (Ratner-Rosenhagen 2012b; Star 2012), the first consistent wave of Nietzsche enthusiasts composed of anarchists, leftist romantic radicals and literary cosmopolitans (Ratner-Rosenhagen 2012a) took Nietzsche as the guiding mentor for their criticism of post-world war I American society, in the works of Bourne, Mencken, Goldman, London and others (Posnock 2011). The second major wave of nietzscheanism in the United States occurred in the 1950s and 1960s, due to the monumental work published by Walter Kaufmann in 1950, *Nietzsche. Philosopher, Psychologist, Antichrist*, and his later systematic translations, and Arthur Danto’s monograph *Nietzsche as Philosopher. An*

Original Study, published in 1965. In the 1970s, the number of works dedicated to Nietzsche in the United States considerably expanded, in the valuable writings of Bernd Magnus, Richard Schacht, Joan Stanbaugh, Robert C. Solomon, John T. Wilcox and others (Tuusvuori 2000). After 1980, remarkable American intellectuals mainly used Nietzsche's thought in support of rejecting foundationalism, defending perspectivism, pragmatism and postmodernism (Harold Bloom, Stanley Cavell, Alexander Nehamas, Richard Rorty, Paul de Man) (Posnock 2011; Siegel 2012; Star 2012) or, quite the contrary, put the German philosopher's works at the foundations of contemporary nihilism and moral relativism (Allan Bloom's *The Closing of the American Mind* being is the forefront of Nietzsche's legacy rebuttal) (Fuyarchuk 2013; Stang 2014). However, generally after 1950, philosophers and intellectuals both in Europe and the United States discovered in Nietzsche the seeds of their own thought, by moving beyond mere descriptions in order to adopt interpretive, subjective and, sometimes, distorted perspectives upon the German philosopher's thought (Schacht 1983; Diethel 2007).

In my view, of the above-mentioned waves of Nietzscheanism in the United States, the most mature, lucid and ideologically undistorted criticism of Nietzsche was the second, especially in the works of Crane Brinton, Walter Kaufmann and Arthur Danto; this means that, in approaching the works of the German philosopher, these critics did not use *justificatory readings of Nietzsche* in order to strengthen their own philosophical options, but rather tried to '*translate*' a *significant Nietzsche* according to their own philosophical vocabularies in order to search for a genuine dialogue with him. The meanings of 'transatlantic Nietzsche' was synonymous in their writings with attempting to close the gap between the rich tradition of European philosophy and the much younger American thought; for instance, the premise the young American analytic philosopher Arthur Danto started with in his debut philosophical book dedicated to the interpretation of Nietzsche was that the widespread distinction between continental (European) philosophy and the anglo-american analytic tradition had been arbitrary, counterproductive and obsolete; through an act of conceptual interpretation, mediated by the procedure of philosophical analysis, Danto was one of the few philosophers attempting at ecumenical proximity between two philosophical orientations.

A case of ‘transatlantic Nietzsche’

In what follows, I will examine the conceptual framework that made Arthur Danto’s instance of ‘transatlantic Nietzsche’ possible; even if the American philosopher’s book on Nietzsche is mildly apologetic, his analytical interpretation does not eschew those inadvertences, difficulties and paradoxes of Nietzsche’s thought. In general terms, any interpretation of Nietzsche’s philosophy is risky and problematic because of the German philosopher’s complexity of philosophical language, his style and method of thinking; moreover, following Nietzsche’s death, his sister became the editor and compiler of his unpublished texts, adding, in this way, further difficulties and obstacles to accurate interpretations. Danto rightfully noted that Nietzsche’s philosophical writing contrasted with the traditional philosophical mannerism, in the sense that his acid rhetoric, unsystematic order of thoughts or his literary-oriented style of writing had been generative of misunderstandings and misreceptions, despite of his highly colloquial and persuasive approaches; his aphoristic manner of writing, his ebullient energy of thought, the provocative style of language and his paradoxical arguments have been augmentative for any attempt of evaluative appreciations. The fact that Nietzsche did not seem to be attached to that traditionally meticulous and distant way of seizing philosophical problems made his conceptualizations essentially incomplete and provisional. For all the above reasons, Danto thought that Nietzsche’s philosophy should not be abstracted from his personality and temperament; probably that’s why Danto’s analytic interpretation of Nietzsche is highly impregnated by psychological considerations, which might diminish its results. Furthermore, the analytical tools Danto used in order to clarify Nietzsche’s thought discerned two main features of his works: the psychologist orientation and the perspectivist theory of knowledge.

The absence of philosophical rigor renders the logical analysis abortive, because the aphoristic and energetic style of Nietzsche’s philosophical writing could not generate definitive conceptual solutions to his philosophical questions; his improvisational style and, accordingly, his aphoristic mastery (Marsden 2006) have been the main reasons for the need of a unifying reconstruction of Nietzsche’s philosophy. According to Danto, “Those fine and subtle distinctions, the circumspect marshaling of argument, the cautious

and qualified inferences which are the hallmarks of professional philosophical writing are conspicuously absent. Nor does one hear that dispassionate, austere tone that philosophers affect. There is, instead, the shrill, carping, at times almost hysterical, voice of the chronic malcontent and pamphleteer.” (1965, pp. 20-21).

Psychologism was the feature that Danto considered the ubiquitous ingredient of Nietzsche’s philosophical commitment, which oscillated between vitalistic impetuses and nihilistic options; essentially, this might have seemed an insurmountable paradox if both philosophies of life and nihilism in the 20th century have considered Nietzsche to be their authentic forerunner. On the one hand, Nietzsche defended common sense as the most pervasive resource of human life and principle of subjective individuation, glorifying vital energies and potentialities; on the other, his diatribes against traditional and mainstream cultural patterns of western civilization consecrated Nietzsche as one of the most acute voices of radical nihilism. By defending individual vitalism and spreading all-encompassing nihilism, the German philosopher curtailed any human or cultural fact to psychological attitudes, so that nothing external to subjectivity could be endorsed as real; moreover, by postulating common sense as the unique possibility of human life, Nietzsche formulated a genuine psychologist ontology which is fundamentally different from the common-sense philosophy of logical positivism in the first decades of the 20th century (Danto 1965). Starting with his early works (*Die Geburt der Tragödie*, for instance), Nietzsche denounced the overall achievements of traditional philosophy and western rationality, substituting them with the exalted rhetoric on the role of passions and sentiments for authentic life.

The problem of conscience is another facet of Nietzsche’s psychologism: challenging the traditional metaphysical assumption according to which there had been a fundamental ontological distinction between consciousness about something and self-consciousness, the German philosopher rejected the artificiality and arbitrariness of the concept of self-consciousness both in Descartes and Kant; in fact, Nietzsche aimed at disqualifying traditional metaphysics as futile and mystifying. Once transcendental self-consciousness is eliminated as a genuine philosophical problem, Nietzsche was left with the option of arguing for radical subjectivism and psychologism (Danto 1965); as far as consciousness about something is concerned, Nietzsche endorsed its public character and

denied its transcendental meaning. In *Nachlass*, Nietzsche thought that "... consciousness has little to do with the individual himself, who might indeed get on in some instinctual and automatic fashion. It has rather to do with relations between individuals. Nietzsche offers what he calls 'an extravagant hypothesis'. The fundamental mistake is to think of consciousness as an individual attribute, and the highest form of individual existence, rather than 'understanding it as a tool in the collective life'. Consciousness is 'only a means of communication; it is developed in (social) intercourse, and with regard to social interests'" (Danto 1965, p. 119).

Nietzsche's views on the problem of morals and morality also straddled between sociological and psychological considerations: socially, the morality of the individual members of society is shaped by a set of rules encapsulating accepted moral codes with the aim of preserving social stability and avoiding anomie; psychologically, moral codes are coercive towards individual freedom, generating harmful effects for human life. Nietzsche's moral psychology became instrumental in the German philosopher's attempt to demystify traditional modern metaphysics (Danto 1964; 1988). Danto noted that Nietzsche's approach of morality in socio-psychological terms is consistent with moral relativism, in the sense that moral systems have an arbitrary and irrelevant ontological value. According to Danto, there are three fundamental steps of Nietzsche's criticism of morals and morality: i) the stage of moral revisionism, in which Nietzsche argued that individual passions and antisocial morality would constitute what he called a superior moral code; ii) the stage of moral innovation in Nietzsche, according to which exceptional and superior individuals could institute a new set of moral rules that would distinguish them from weak and humble persons; iii) the stage of immoralism, in which Nietzsche harshly opposed Christian morality (Danto 1965).

The climax of cultural criticism in Nietzsche is related to the rebuttal of Christian religion: the inconsistency and falsity of religious sentiments for human life stem are obvious because of their incompatibility with the human vital impulses; instead of encouraging strong wills and characters, Christian religion and morality were responsible, according to Nietzsche, of praising weak sentiments, such as suffering, pity, compassion and piety. Danto's conceptual analysis of these sentiments led to certain misunderstandings concerning Nietzsche's approach in this respect, as in the case of the American

philosopher's distinction between intensional and extensional suffering (Fraser 1988; Conway 1994).

The most controversial and comprehensive concept on which Nietzsche himself elaborated during the last years of his life was the will-to-power; according to Danto, the intricate nature of this concept could be grasped psychologically, ontologically and metaphysically (Danto 1965). Psychologically, the will-to-power functions as specific modalities of imposing subjective wills and passions upon external realities and inter-individual relations; ontologically, the will-to-power seems to stand for the old traditional concept of 'substance', in the sense that it is not an attribute or a quality of individuals, but their most intimate and substantial ingredients that enables the principle of individuation; metaphysically, it is rather difficult to grasp the "dynamic idealism" (Danto 1965, p. 232) of Nietzsche's understanding of the concept as a synthetic force regulating the sum of all individual actions in this world or even as the very condition of life's possibility.

But the essential marks of Nietzsche's psychologism are the aesthetic attitude of vitalism and his epistemic nihilism. As far as vitalism is concerned, Nietzsche's works almost obsessively endorsed the importance of passions, vital forces and impulses for human life; probably the most relevant instantiation of Nietzsche's vitalism can be found in his understanding of art. According to Nietzsche, the synthesis between the Apollinian and the Dionysiac art was made possible in the era of Greek tragedy, when music, lyrics and poetry (as pure expressions of the Dionysiac) and painting (as Apollinian endeavor) enhanced the tragic sentiment of life; later, with the advent of Socratism, Western rationality annihilated passions and vital impetuses through dialectics and logical thinking (Danto 1965). On the other hand, Danto's analysis of Nietzsche's nihilism put forward two fundamental nihilistic orientations of the German philosopher: i) a form of radical and complete nihilism encompassing a comprehensive negation of values, language and the overall existence of real things; according to Danto, this is Nietzsche's metaphysical or semantic nihilism; ii) psychological or decadent nihilism, which is incomplete, anarchic and relativistic at best, expressing a destructive and negative attitude towards traditional values and canons, moral and religious teachings etc. (Danto 1965). Other critics followed Nietzsche's distinction between active and passive nihilism and found that the first kind was specific to the German philosopher's understanding of classical pessimism, while the

second was characteristic to romanticism; accordingly, the form of nihilism was dependant on the various dispositions of historical pessimism (Sorgner 2007).

The second fundamental pillar of Nietzsche's philosophy, alongside psychologism, is *perspectivism*. In general terms, perspectivism was characteristic for a certain orientation in epistemology according to which objective and foundational theories of knowledge were rendered as mere illusions, mystifications and dogmatism: "The doctrine that there are no facts but only interpretations was termed *Perspectivism*. To be sure, we speak of seeing the same thing from different perspectives, and we might allow that there is no way to see the thing *save* through a perspective and, finally, that there is no one perspective which is privileged over any other... The only difficulty here is in talking about the 'same thing' on which these are distinct perspectives" (Danto 1965, p. 77). Even if Nietzschean perspectivism might stand for a certain epistemological view, it is rather inaccurate to conclude that Nietzsche developed a theory of knowledge proper; in fact, the German philosopher detested the idea that a theory in general could be a solution to practical problems or would have some minimal utility. At best, any applied interpretation attempting to highlight Nietzsche's epistemological views would reveal a non-standard, dissident and unconventional preference of the German philosopher for the true possibilities of knowing something; according to Nietzsche, any philosophical theory of knowledge (i.e., epistemology, in its classic understanding) should be abolished and replaced with a profoundly original approach of knowledge. Generally, the idea of this original view could result from the separate consideration of the three major structures that comprise it: perspectivism, Nietzsche's conception on science and his so-called methodology.

In a wider sense, the effective instantiation of a perspective would entail an interpretation; the concept of perspectivism is descriptive in regard to a general framework of competition among various interpretations. Nietzsche's concept of interpretation is distinct from its hermeneutic approach: the German thinker did not conceive interpretation as a subjective mode of comprehension adequate to some meanings external to the interpreter, but instead advocated a simplistic and unmediated understanding of the concept; he envisaged interpretation not as a reflexive exercise applied to the contents of past and present (external) realities, but the sum of the impulses, desires, dispositions and

hopes based on which interpretation acquires meaning and utility for life. As such, interpretations can be metaphors, fictions, myths, creations or innovations, each of them being characteristic descriptive acts for understanding human vital energy. No perspective can be considered more truthful, more meaningful or more useful in relation to other possible perspectives. Interpretation as perspectivism in Nietzsche was adopted, for instance, by some representatives of classical pragmatism in the United States, such as William James, and later, in postmodernism, by literary critics, such as Paul de Man. Nietzsche's perspectivism can be thus considered as an attempt to legitimise commonsense and to reveal the inner individual resources; any perspective would reveal particular experiences and fictional manifestations in the construction of the world. Danto emphasises that any perspective is a purely subjective interpretation, an external projection of one's inner vital energy, a means of representation similar to the act of painting (Danto 1965). Recently, the reception of Nietzsche's perspectivism in the United States led to further refining the analysis of the concept; for instance, regarding the connections between the subjective perspective and its object, four postulates might be considered consistent with Nietzsche's views: i) when considering an object from a certain perspective, the correlative terms of position, distance or circumstance become explanatory for the nature of perspective; ii) the bigger the number of perspectives on one and the same object, the bigger the chances for a superior knowledge of it; iii) the number of possible perspectives on one and the same object is infinite and iv) any perspective might be distorted by circumstantial factors (Leiter 2002). Essentially, Nietzsche's perspectivism was assimilated to criticism against the concept of objective knowledge.

In his work *Götzen-Dämmerung*, Nietzsche denounced the errors, mystifications, oversimplifications and falsifications of traditional knowledge which was founded on some methodological misconceptions, such as deductive explanation and logical rationality; in his view, true knowledge should be conceived as innovation, creation and original intuition; according to Danto, by postulating this radical criticism on the concept of traditional knowledge, Nietzsche was the prophet of contemporary science, which is fundamentally "antimetaphysical, proscientific, therapeutic" (1965, p. 70). Danto's comments on Nietzsche's conception of science might be summarised in five theses that obviously reveal his concern with an analytical interpretation of the German thinker's

general conception of science: 1) the new scientific orientation should destroy rather than reject the old scientific and philosophical traditions by means of arguments: Danto considers this Nietzschean suggestion to be similar to the logical positivism's attack that denounced philosophical issues as non-senses, denying their assessment as true or false; 2) the new scientific orientation should reveal the traditional philosophical problems as lacking any genuine value for life; 3) the new science needs to completely reconsider the problem of language; the most expressive language is the one related to commonsense understanding, transmitting life experiences in the most relevant way; 4) in Nietzsche's terms, the scientific nature of our conceptions should eliminate from their content the idea of a correspondence between conceptual language and reality; 5) the new science no longer needs to call upon the substantial theoretical entities or to real definitions; the strong concepts of traditional metaphysics should be replaced with instrumental concepts specific to observational language. The complexity of life cannot be reduced to the conceptual schemes of abstract intellectual categories (Danto 1965). In the fourth edition of his monumental monograph dedicated to Nietzsche, Walter Kaufmann rejected Danto's cognitivist interpretation of Nietzsche's concept of knowledge as inadequate and nonspecific to Nietzsche's views (1975), while Brian Leiter welcomed Danto's analysis of Nietzsche's epistemological scepticism regarding the concepts of knowledge, truth and meaning (2002).

Because of the failure resulting from conceiving acts of knowledge or theoretical approaches in terms of truth claims, Danto mentioned the German thinker's commitment to a certain kind of methodological monism: Danto's thesis was that Nietzsche's aphorisms reduced the specific philosophical conceptualizations to a psychologist mechanism for considering them; even his epistemological scepticism could be grasped as a methodological attitude that categorically rejected rational or experimental models of knowledge (1965). Nietzsche's methodological endeavour could be also tested when analyzing his criticism on modern theories of knowledge - empiricism and rationalism (Sorgner 2007). However, if there are sufficient premises to speak about Nietzsche's methodology, the topic still remains highly controversial: be it the 'tragic method' (Deleuze 1983), the 'decadent-style method' (Kaufmann 1950), the 'pragmatic method' (Danto 1965), or the 'naturalist method' (Schacht 1983), the question regarding his method

of thinking is answered within the limits of perspectivist interpretations, in their turn, to Nietzsche's philosophy.

Surprisingly, Danto's comments on the meaning of language in Nietzsche are rather incomplete: apart from his explicit references according to which the German philosopher seized the prevalent value and function of language as metaphorical, the American philosopher did not extend his analysis beyond this consideration; however, he correctly amended Nietzsche's reductionism on the topic by observing that metaphors could not extensively mediate between the concepts of our mind and the more complicated structure of the external world; in fact, this was plainly consistent with Nietzsche's philosophical views which favoured intense subjective experiences to the detriment of objective realities, intuitions rather than representations, fictional worlds instead of certainties (Danto 1965); but, if this is the case, "To say that all sentences are metaphorical entails that the thesis itself is metaphorical, hence not literally true, hence literally false. So, if he is right, he is wrong" (Danto 1965, p. 44). One should not be bothered by this flagrant contradiction of Nietzsche's thought, since Danto has noticed at least ten distinct styles regarding the formulation of his philosophical views by rigorously analyzing the 'propositionality' of the German philosopher's writing (Danto 1988).

A substantial analysis of Nietzsche's general ontology is rather missing in Danto's commentary; since Nietzsche was categorical in dismissing the external world, it would have been superfluous to go beyond what Nietzsche himself admitted as the only real and objective entities, the subjective experiences. By stating that the objective reality of the world is identical with the subjective nature of our experiences, Nietzsche eliminated the old metaphysical distinction between appearance and reality as an abstract and pointless philosophical dispute (Danto 1965; Schacht 1983).

Danto's analytical interpretation of Nietzsche's philosophy cannot be complete without a series of considerations regarding the concept of truth and further presuppositions about a hypothetical theory of truth in Nietzsche's thinking; two of Nietzsche's commentators observed Danto's attempt to interpret Nietzsche's theory of truth by reference to the correspondence theory of truth and to an original Nietzschean formulation of a pragmatic theory of truth (Hill 2003; Sorgner 2007). First of all, Hill noticed that Danto put forward a pragmatic interpretation of Nietzsche's theory of truth

under the influence of the German thinker's profound anti-metaphysical orientation; in other words, Danto believed that Nietzsche's pragmatic inclination came from his psychological or axiological, rather than epistemological, conception of truth: Nietzsche replaced the essentialist and metaphysical definition of truth with the consideration of the psychological processes underlying the valorisation of truth. On the other hand, Sorgner argued that Danto's oscillation between correspondentialism and pragmatism in equivocally interpreting Nietzsche's conception of truth was derived from a major difficulty to establish the nature and criteria of truth; in Sorgner's view, this is a metaphysical theory of truth and the only veritable metaphysical doctrines in Nietzsche's work were 'the will to power' and 'the eternal recurrence of the same'. Obviously, neither metaphysical doctrine enables a consistent theory of truth; thus, Danto would have been forced to adopt a pragmatic interpretation of truth in Nietzsche also because of the fact that he was unable to bring together the two distinct theories of truth. In my view, I believe that both critical positions, although not inadequate, are simplifying and, consequently, should be nuanced and amended. Danto's probable objection to both criticisms could have been that the correspondence theory of truth, at least as it was manifest in Nietzsche's works, was not a metaphysical option, but a cognitive one; however, from a cognitive point of view, any theory of truth is impossible based on Nietzsche's works because objective truth stands in sharp contrast with his views claiming that both arts and sciences operate with illusions rather than truths; the distinction resides in the fact the arts provide for living illusions, while science defend obsolete and abstract ones. Following a careful reading, a reply to the two commentators should be focused on a suggestive distinction that Danto used in order to describe the pragmatic meaning of truth as opposed to the correspondentialist one: in a restricted sense, the truth in Nietzsche should be understood from a pragmatic viewpoint because it does not refer to its positive denotations, but to the rejection of what is false; in this sense, Nietzsche insisted on the utility of truths for life. Nevertheless, the instrumentalist understanding of truth in Nietzsche still prevails; in Danto's view, something does not need to correspond to truth in order to be considered true; this means that a genuine correspondence between a concept and an external reality is not possible because the world as such does not exist, but is rather a perspectivist creation: "Was his philosophy, too, a matter of mere convention, fiction, and Will-to-Power? To put

it sophomorically but no less vexingly, was it his intention, in saying that nothing is true, to say something true? If he succeeded, then of course he failed, for if it is true that nothing is true, something is true after all. If it is false, then something again is true. If, again, what he says is as arbitrary as he has said, critically, that all of philosophy is, why should we accept him if we are to reject the others? And if not arbitrary, how can it be right?" (Danto 1965, p. 230).

Many Nietzsches, one America

In a sense, one story of America can be told through the ‘intellectual peregrinations’ of the German philosopher Friedrich Nietzsche within the cultural traditions of the Mew World. Due to the immediate impact that the writings of Nietzsche had on the American mindset, his legacy has been highly circulating and spread in the various currents of American culture. In fact, Nietzsche started to enter the United States in the period of his last years of life, at the turn of the twentieth century. The American scholar Jennifer Ratner-Rosenhagen mentioned, in her recent survey of Nietzsche’s legacy in the United States, not only the first doctoral student extensively studying Nietzsche, Wilbur Urban in 1897, in Jena (2012a), but also amateur philosophers, intellectual voyeurs, well-known literary figures in America (for instance, Scott Fitzgerald or Jack London), and even clerics and rampant and disturbed social rebels: “Since I began researching the history of American interest in the German philosopher in the late 1990s, three high-profile rampages by angry, disaffected young men left a bloody trail back to his ideas: the 1997 Pearl High School shootings; the 1999 Columbine High School massacre; and the 2001 brutal double homicide of husband-and-wife Dartmouth College professors in their home” (Ratner-Rosenhagen 2012b). The author also tells the story of kind and affectionate letters that Elisabeth Förster-Nietzsche, the philosopher’s sister, used to receive from transatlantic sympathisers.

If Nietzsche’s reception in America was, around 1900 and after, plural, enthusiastic and magisterial, so were the ideological underpinnings to be found in most of his followers’ writings. For instance, the classical pragmatic philosopher William James frequently mentioned Nietzsche’s name as exemplary for the criticism of metaphysics in

the first decade of the twentieth century, or in the context of his vivid argumentations on the role of human intuitions and emotions for knowledge. One decade later, around the 1920s, young American intellectuals, such as Randolph Bourne or Henri Louis Mencken, pointed at Nietzsche in their criticism of the American culture and civilization of those times.

But systematic works on the German philosopher's writings had been absent until 1940, when Nietzsche started to be considered more seriously; in 1950, Walter Kaufmann published a comprehensive book on Nietzsche, overcoming the previous circumstantial, cross-cultural and particularist readings and references to his works and launching a long-term practice of scholarly-qualified and multi-faceted research on his very complex philosophical themes. One of these approaches that was not designed for legitimizing the author's own philosophical insights, but for unpartisan analysis, interpretation and clarification of Nietzsche's philosophy was published in 1965 by the American analytic philosopher Arthur Danto and was followed, in the 1970s and 1980s, by a long series of books published especially by professional philosophers and academic scholars. Alternatively, in the turmoil of the 1960s civil rights movements in the United States, Nietzsche began to be extensively used by radical leftists, anarchists and, in the academic field, as one of the most quoted intellectual figures within the context of the so-called 'culture wars'. The 'ideological Nietzsche' in America was lucidly analyzed by Allan Bloom in his cornerstone book *The Closing of the American Mind*, who drastically concluded that the 'American Nietzsche' left an undeniable cultural imprint which the author termed as "nihilism with a happy ending" (1987). In brief, in the second half of the twentieth century, apart from those ideologically-neutral academic investigations of Nietzsche, one of the most pressing questions was how to appropriate – and sometimes to ex-propriate – Nietzsche for various political agendas; in other words, the question 'is Nietzsche a thinker to think with or against?' became pervasive in various circles of the American intellectual fields. The resourceful suggestions of his writings are far from being exhausted, so the question of how Nietzsche will be read in the future remains highly mysterious and challenging.

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BETWEEN RESISTANT PASTS AND UNSETTLED FUTURES, IS THERE A PRESENT FOR TRANSATLANTIC RELATIONS?

Dr. Marius Jucan

Professor

Babeş-Bolyai University, Cluj-Napoca, Romania

marjucan@yahoo.com

Abstract: *Seeing the “present” as being a philosophical and political entity linked to the idea of representation in politics and international relations studies, I intend to focus on two aspects characterizing the transatlantic world, namely the variety of meanings acquired by democracy in the Western world, and the building of European conformity and possibly, future common identity in the European Union. I consider that politics in the transatlantic area provide a capital importance to these above mentioned questions. They have oriented governments’ programs as well as people’s daily perceptions of globalization and modernization. Though not considering the growing distance between the USA and the EU as a dramatic effect of the post-Cold War period, I uphold that the concept of Atlanticism has considerably changed, and is no longer working as a symbol for the Western world. Nowadays, Atlanticism connotes different values for the USA and the European members of the NATO, a state of things which deepen the crisis of the Western. As the EU expands quickly toward the East, a new dimension of the EU is under progress, depending on the extraordinary, possible integration of the republics of Moldova, Ukraine and Georgia. Under the circumstances, trans-atlanticism will not be able to cover the range of Europe stretching from the Atlantic to the Urals. Will a bigger Europe be a better one?*

Keywords: transatlantic relations, European integration, European enlargement, virtue, liberalism

I consider the present of the transatlantic relations is a privileged moment of reflection. Seeing the “present” in politics and international relations as representing the actual face of reality and not the potential, possible one, I intend to analyze two intertwined questions playing a great influence on the Western world, namely the existence of various interpretations regarding democracy and the (re)construction of the European identity. Both of them seem to me essential in the shaping of the “present” in the Western world as an act of will determining the critique of the past, of its legacy, in outlining the possibility of the future. Though the notion on the “present” invites a larger theoretical grounding, which may well go beyond the bounds of this article, I venture to say that the notion of the “present” belongs inherently to the concept of modernity, and modernity should be

understood as the fruition of Western tradition. At the same time, connecting the idea of present to the idea of modernity, one is aware of the fundamental role of *will* in all foundational achievements of the transatlantic world from secularization to the Enlightenment, from the revolution to the avant-garde and the birth of techno-science. In all these previous chapters of modernity, criticism of the legacy of the past and the theoretical grounding of the future was based on *will* and on its actuation. I look at the idea of the “present” as a form of actuating *will* in order to create another re-presentation of the surrounding world according to reasons and motives which outrun the moment of the manifestation of *will*. Thus, the notions of *will* and *present* are clearly bound in the history of modernity in Europe and North America and I do not see any general impediment to hinder the preservation of their binding, the making of the present within the actuation and the necessary will-to-act. This is the reason why the Western world is a persuading image of the triumph of will, and that criticism of the present world should be addressed primarily to the originating will-to-act. In closing this short introduction to the question of present in the transatlantic world, I do not intend to refer here to either the philosophical or political *will-to-power*, which I regard as an essential component of the *will-to-act* in the democratic order set up by revolutions and in reforms in Western society.

Setting a perspective on the present of the Western world means to reflect on the concatenation of the European and American experiences of the past, as well as on the possibility of the future in postmodern global circumstances. The unequal rhythm and course of development in the transatlantic world provoked eventually a great difference of cultural standards and a variety of perceptions regarding democracy as the 20th century may be described as the century of the advancement and internationalization of democracy. Yet, at the same time, different interpretations concerning the building of democracy and its present in the Western world split Europe and North America (Garton Ash 2006). Since the end of WWII, integrationist theories urged the creation of a perfectible Europe, claiming that a rationally constructed Europe will appease all conflicts in the part of the world, and finally do away with them. As for the USA, the circumstances of the Cold War shaped new dimensions for both democracy and republicanism in North America, but also in the whole world. The two aspects are essential in the implementation of the present in transatlantic relations, not only historically, in accounting for the road taken from the end

of the 20th century, but also when looking at the increasing distance between the EU and the USA, at the process of deepening European solidarity, last but not least, the unsustainability of political decisions without strong cultural fundaments. Since the federalism of Coudenhove-Kalergi and the days of Altiero Spinelli, European integrationist theories went from functionalism, transactionalism and neo-institutionalism, justifying the will to act in making a new Europe and the obsolescence of the memory of the past (Hoffmann 1995). Though, Stanley Hofmann's considerations on the failing capacity of Europe to achieve its ambitious goals are probably too severe with the nowadays promising prospects of the EU, in many instances, his analyses on European politics are right, pointing that the ghosts of the past did not vanish into thin air. In many instances the neglecting of the memory of the past took its revenge, as shown in the emerging wave of European nationalism, populism and anarchy. Once, referring to the role played by the "memory of a historical community", Ernst B. Haas upheld that the past is not a "causative" agent (Haas 1961). How wrong he had been there is no way of saying, but at that time, Europe had vaguely a voice of her own, bearing the imprint of the American presence and fearing the risks of Sovietization. It was somehow natural that the past was regarded with diffidence, believing that the *will-to-act* is naturally oriented toward the future.

The growing risks of an insecure present world order, terrorism and economic crisis have corroded the prestige of a once united and powerful West. Certainly, I refer to a rather mythical West, a seductive image of freedom and democracy I fell in love with in the years of the Cold War. It took a good many years to perceive the conventionality of this emblematic image, and to attempt to understand the unstoppable cultural and political tensions of the West, on the both shore of the Atlantic. Once the downfall of communism had been feted as a great victory of liberal democracy, Europe continued its momentous journey toward a possible future Federation or a more powerful European solidarity. It was also the moment of bidding adieu to the days of the "Atlanticist" order. At its turn, the USA began its slow retreat from Western Europe, and got more focused on the Pacific rim China and Asia, consolidating their global power. By saying this, I am not stating that the USA abandoned the EU, but that toward the 1990s, the Americans started a new policy toward Eastern Europe in the context of a new "Eastern" frontier drawn in front of Iraq and

Afghanistan. The transatlantic world's format has considerably changed, comprising countries which did not experience the doctrine and the goals of Atlanticism, and which by agreeing to the augmentation of the transatlantic field of operations, were included inside the alliance. The military cooperation of Romanians and Poles inside the Northern Alliance proved efficient, showing that the common danger of terrorism melt down cultural asymmetries lying under institutional conformity. The military fraternization inside the NATO remains however a first-hand quality episode of cooperation of the USA and Eastern European countries, the good part in the story of the expansion of the West. The bad part of it is that this cooperation was determined as in the case of Western Europe in the days of the Cold War, by the challenge of a common enemy and that once the cause will disappear, the effect will vanish, as well. Nevertheless, even in this case, the cooperation in the area of the common defence may develop and qualify other opportunities, since military globalization and the network of information are substantial for general politics. Expectation of new risks in the Near East may strengthen military cooperation in Eastern Europe and further in other areas, as for instance in the one regarding traditional and non-traditional types of energy, as well as their types of exploitation and management.

The spillover process of Europe enhanced the need to consolidate the already contour of a new Europe, although sometimes in simple metaphors as the one referring to the "pedalling of a bike". Of course, when biking, looking backwards is dangerous. At the same time, nobody assures the biker against potholes, crowded traffic or bad weather conditions. Biking is an individualistic sport and relates to the capacity of each cyclist to sustain himself, a symbolic memento of the union of individualistic bikers in the UE, at the present moment. Running away from the consequences of totalitarian past was a logical move to create a new political present, for Western Europe after the WWII, as well as for the other half of Europe starting with the fall of 1989. The historical opportunity to bring together the two artificially separated parts of Europe (because of Nazism and Stalinism) was inspirational for the European Project and for the gradual transformation of the "whole" Europe into a union and a communion led by the same interests, first of all, even if the two reunited parties had not the same passions and virtues. Yet, it would be naïve to think that repressed habits and memories won't return clad in other garments. In other

words, if new European constitutions were necessarily changed, it was however not sufficient to bring European countries in the name of common trust, on the soil of peace and prosperity. Besides the political will-to-act, one should have examined as well the “resistance” of the past and its strict and rigorous hierarchies of motives.

The downfall of the Berlin wall triggered a process of re-evaluating the common future of all participants, old and new. The process of integration removed intentionally the burden of the past, operating a rational selection on its deep memory in the hope of guaranteeing the continuity of peaceful progress. The founding of the EU, its enlargement and consolidation was mirrored as a necessary, rational evolution, enhancing the progress of Europe to unreached dimensions and horizons. It was a lofty, heart-lifting prospect after so many years of dejection and despair. But when various setbacks began to impair the speed of the European project, slowing down its course, it appeared that the legacy of the past refused to be handed down to administrators and politicians who did not pay heed to the cultural fault-lines severing the Eastern part of Europe from the Western one. Current frictions concerning immigration of Roma people for instance, showed the formal, superficial degree of integration and the stubborn resistance of ethnic, racial stereotypes. Remembering now the enthusiasm of the beginning, one is aware of the manifold faces of modernization in Europe. On the other hand, lack of a strong support for a democratic state and order, as in the case of Romania, proves that one cannot think of an efficient democracy in the absence of the developed civil society of an overwhelming, literate, urban population. In the Romania's example, inadequate, insufficient representation of modernization, democracy and ‘European-ness’ may develop into unwanted consequences, brewing ambiguity as to the future of European countries.

Acceleration of European integration and enlargement let out from the Pandora's box a mixed discourse of nationalism, xenophobia and political extremism. Compared to American parochialism, European localism is deeply entrenched in political, religious and cultural traditions which have always stood against the universal peace pretences. The European project was equally endangered by Brussels officials who did not take the trouble of explaining how European identity, national independence and sovereignty would work within an interdependent world. National icons have not died away and the EU leaders have not reached a common ground to debate the opportunity of laying the foundations of

a European Federation. The European Federation is nowadays deemed by many Europeans to solve present deficiencies by moving over all obstacles, creating a more coherent institutional architecture having a higher degree of cogency and a higher level of responsibility for all members. It is obvious that the perspective of a political union might produce divisions among Germany and France, the old promoters of the European Project. Politically speaking, the EU is far from the capacity of imposing respect on a global scale, which had developed many uncertainties concerning the real degree of sovereignty of the members of the EU. Finally, the creation of a Federation will put in work a different hierarchy than the existent one, which may cause suspicions and doubts, causing the delay of putting into practice a stronger European unity. It would be interesting to know why, when in times of economic contraction, people began to doubt about the role of the EU. In spite of euro-skeptic attitudes, it is highly improbable for Europeans to turn to the Cold War divisions. At the same time, no one could deny the birth of other types of divisions inside united Europe, among Europeans and European states. Because of the velocity of the integration and expansion process, hidden economic, cultural and educational controversies as well as environmental problems appeared needing professional consulting and solving. The EU top-down construction policies differs fundamentally from the American ones, and contradictions between the two ways of establishing a democratic union did not tardy to appear. The contrastive, opposite responses given to different matters as questions of religion, education, defence, death penalty, multiculturalism, etc., provide the observer with a map of diametrical opposite solutions as to the way of building a huge alliance of individuals of various nationalities, cultures, ethnic legacies, having however the same aim of enjoying higher standards of life, safety and certainty of peace.

An extraordinary amount of “will-to-act” is still necessary for the European deeper integration and the construction of liberal solidarity which has never existed before in Europe. I accentuate the relevance of liberalism within the idea of European solidarity, since Europe has known other forms of solidarity, either in the name of race, blood or class, which all ended in disaster. It is now the right time to ask Europeans where from will they be drawing the necessary determination to move along the mapped route of integration without firmer political tokens? According to Judith K. Shklar, an American political theorist, liberalism is based on fear. Therefore it seems that fear may hold in

check expectations of the future. Shklar developed a complex theory based on the interaction between fear of law and fear of anarchy, or fear of tyranny, illustrating the traditions of European liberalism and of American revolution. Actually Shklar's theoretical formula of "the liberalism of fear" brings together the political will-to-act with its cultural grounding, according to her statement "we fear a society of fearful people". (1998) One should consider the representation of "fearful people" in (re)constructing of the new European identity, as well as in the wilful re-creation of a society as the social-cultural process in which nothing should be conducive to fear. "Fear" is, as everyone knows, a strong unpleasant emotion which signals the awareness of a danger or risk, as to make one take conclusive action. Fear is essential to understand not only the psychology of a living being, but also the limits of freedom and coerciveness in a civilization. Regarding the process of building a new European identity, the fear of the "fearful people" in Europe has launched a profound cultural and political process of change, bringing the majority of European countries into the peaceful and prosperous alliance of the EU. Yet, one may ask, is it a sufficient reason to forge a new identity? The question has two answers, a negative one, if thinking at the capacity of defence of Europe undertaken by Europeans, and an affirmative one, admitting that such a complex process won't come to completion without a scale of gradual approaches. Since common prosperity has been in the modern age a determining goal for the implementation of democracy and freedom, the EU and the USA are definitely following the liberal traditions of the Western world, namely in sublating fear in the making of the present as a 'better world'. Returning to the obligatory condition of prosperity, the almost universal dream of a "better world" which ornate the design of future, it is obvious that economic differences and economic contractions shattered the perceptions of European unity.

In fact, one can observe that some European countries, the most developed ones feared better than others, located in Southern or Eastern Europe, and that some countries have reached undoubtedly the status of the beneficiaries of the integration and enlargement process. France and especially Germany have prospered since the enlargement process, due to the continuous waves of educated emigrants coming from the Eastern part of Europe. It goes without saying that other European countries still struggle with different sets of difficulties, and their tantalizing course of recuperating the civilization delay which

separates them from Western countries has got in store other “chapters” to be closed. Actually, in the remaking of the European identity, the so-called ‘unity through diversity’, a slogan of Romantic origin, cannot hide the pride of being unique and different. The unquestionable uniqueness of each and every European region creates and develops an exceptional mosaic, far more dangerous than American exceptionalism. But in order to find out what are the Europeans’ chances to perfect their identity, one should return to the connotations of their newly-built identity.

The crisis of the transatlantic world displays various dramatic areas, having as a historical background the modernist and postmodernist development and most of all the process of globalization and its consequences. There are different theoretical views regarding globalization, therefore in this article, I should specify that I take into consideration some of the theoretical points of view of Anthony Giddens, Ulrich Beck, Zygmunt Baumann, Andreas Huyssens. Anthony Giddens provided a crucial contribution to the understanding of the relation between modernity and globalization and also to the question of the (re)construction of the new European identity. Giddens points out that state sovereignty does not disappear because of globalization. Actually, state sovereignty may vary according to the conjectures of alliances, so that there may be state whose sovereignty will be diminished and states enjoying a stronger state sovereignty (Giddens 2000). The implications of the “losing” or “gaining” more sovereignty in relation with alliances speaks directly about the case of the rapports between the EU and the USA, that the possible abandoning of the NATO alliance would be a fatal loss for both of the Western great entities. Concerning the development of modernity in its relation to the future, Giddens remarked on the fact that modernity is inherently oriented toward the future, whose anticipation and “rationalization” is achieved in order to contain and control the time to come in the of an ontological safety (Giddens 2000). In his rich and challenging study of globalization, Ulrich Beck tackles two groundbreaking questions, namely the role of the image (and imaginary) and the formation of a new civil society. Quoting another theorist of globalization, Arjun Appadurai, Beck underlines the structuring role of the *image* and the perception of the “glocal” in different parts of the world (Beck 2003). In the same effort to sort out the traits of an ongoing process, globalization, Beck notices that

globalization does not exclude conflicts, quite on the contrary, it may bring states against other states, as well as the transformation of politics into *meta-politics* (Beck 2003).

It is interesting to note that Zygmunt Bauman does not agree to the popular thesis of the "glocalization", for him globalization and localization being oriented against each other (Bauman 1998). Bauman asserts that globalization creates a new world order through an inevitable process of exclusion and separation. The price of change is paid by the new middle class, which becomes inevitably exposed to existential risks, anxiety and fear. Therefore the image of the more or less organic type of bourgeois society disappears, as well as the foundational dream of the formation of a "decent middle-class". The magnet of the Western world, the buffer area between the rich and the poor, the class said to hold in a firm hand centrifugal tendencies (extremist, as well) has been destroyed, and, in the long run, the West will experience high social tensions between upper and lower classes. It is not for the first time that, after Oswald Spengler, the decay of the West is prophesized with such a convincing tone. More and more pessimistic voices, the voices of American theorists and intellectuals, as for instance Christopher Lasch and Francis Fukuyama, announce the approaching end of the West, counting down the time left for an impossible salvation. Quoting a peculiarly singular French theorist, Cornelius Castoriadis, Bauman underlines that fact that the present world does not have any epistemic goals, that the present-day society has stopped asking questions about itself and the surrounding world, a most dangerous situation ever occurring in modernity. Nowadays is the time when neo-tribalist currents assert themselves public life and fundamentalism wins both in the Right and Left divisions of the Western political system. Bauman writes about a hybridization process taking place in the world, changing from the root the structure of the Western society and of its elite. An expert on hybrid cultures, Nestor Garcia Canclini, asserts that hybridization in the age of globalization touches on both hegemonic groups and popular sectors, relativizing the notion of identity, so that it is almost impossible to imagine identity as a given set of recognizable traits (1990).

Andreas Huyssens brings into debate the relevance of the "memory discourse" and discusses convincingly about the globalization of memory seen as a paradox of globalization (2003). The same author reconsiders the relation between technology and avant-garde, claiming that the European avant-garde was possible mainly because of the

development of technology which shattered completely the organic, mimetic principle of bourgeois art (1986). The statements of the American professor point to the delicate juncture between artistic avant-garde and the progress of technology, as well as to the manner in which theories of artistic avant-garde have crossed the field of literature and culture into the one of politics, spurring civilizational consequences and determining societal development. Examining the liaisons between technology and artistic avant-garde, Huyssens underlines the unique role of the Western avant-garde in disseminating and enhancing modernity through works of art and theoretical approaches to artistic creation.

Cultural relativism, recognition and implementation of democratic rights and criticism of traditional authority were decisive for the augmentation of the transatlantic crisis. The fragmentation of the West had been evident even before the post-Cold War period occurred, but after the beginning of the new millennium, the distance among the shores of the Atlantic was wider than ever. The WWII aftermath, decolonization, post-industrial and informational revolutions, the collapse of communism, economic crises, immigration and religious issues brought testimony to the widening space between the EU and the USA. Nowadays, it is common wisdom that the EU and the USA dissemble more than they resemble. Though the transatlantic crisis was dramatized to an unattained level, no analyst has predicted so far a brutal rupture, a military conflict, final economic separations, or worse diplomatic conflicts than the older ones (Lundestad 2003). Present-day euro-skeptics hold that part of the crisis of transatlantic relations is to be found in the unsolved problems of the Western world, as well as in the recently admitted Eastern European countries. Criticizing American “unilateralism” and supremacy, great European states as Germany and France deplore the quality of transatlantic diplomatic communication and the inflexibility of the American power as shown in the case of the Iraq war (Levy, Pensky, Torpey 2005). The rise of Eurasianism might be seen as a source for future crises in the Eastern part of the EU. Marlène Laruelle thinks that Eurasianism will increase in power and influence, due to its anti-globalization and anti-Americanist goals, being at the same time a coherent civilizational response to the Russian conservative layers of intellectuals and politicians against modernization and its course. Eurasianism claims to be a sort of “total” organic explanation of the role of Russian civilization as a continuation of old days and glories (2008).

The clash between Islamic religiousness and democratization in Arab countries, the search for new energetic sources and the preservation of decent life standards in spite of the emigration, the need to enhance education and preservation of the health system divided deeply the European political class. It is obvious that under-development, racial, political, ethnic and civilizational conflicts determine people in poorer regions of Europe leave their homeland, looking for a better life, a phenomenon leading to depopulation in certain regions and overpopulation in others, creating excessive agglomeration and a critical lowering of life standards, xenophobe and racist manifestations. As the conflict between the European and Islamic mentalities goes on amplifying the civilizational rift, there are no visible political solutions for the moment. The geo-strategic riddle of the Near East has remained unsolved for generations of politicians, proving that political solutions which exclude religion are doomed to failure, and that the “game” of politics is infertile outside the spirit of local traditions. The disappearance of the Arab caliphate, the forced modernization of the Turkish state under Kemal Ataturk, the appearance of wahabism and of the Muslim Brothers organization stood for an unsurpassable chasm between the Islamic culture and the European one. Islamic religion remained alive in the 20th century, when secularization in Western world became triumphant. The eternity of salvation still exists in the spirit and in the flesh of the “ulama”. The rebirth of the religious feeling in Eastern Europe, for instance, demonstrates that capitalist materialism and hedonism might be rejected and that Weberian secularization has had a regional appliance. If European civilization attests its superiority in technology and technocracy, but it cannot stop the existence of other types of civilizations which combine the spirit of religion with the efficiency of technology, as in the example of Saudi Arabia. Secularization of Islam continues to be the apple of discord among many Arab intellectuals, claiming that “modernization” should be embraced unless the past may relentlessly repeat itself (Ali 2002).

The transatlantic crisis has been deepened by the disappointing quality of the political “class” in Europe and the US, by its inability to foresee conflicts and prevent them. The making of a safer world would have been the key-role of postmodern leaders, if things depended only on citizens’ votes. Unfortunately, democracy is probably the most imperfect political regime and it allows political leaders to postpone and even forget about

their electoral promises. The process of political representation in democratic institutions has been perverted in many European countries as well as in the USA by the bureaucrats' tendency to reproduce the institutional apparatus. The intrinsic power of institutions has deprived political representation of its meaning, leaving the responsibility of accomplishing electoral programs on fewer and fewer political actors. When authoritarian or charismatic leaders, especially the military ones, were replaced by administrators, bureaucrats, technocrats or managers, the hope for a new manner of political leadership in Europe and the USA was legitimate, but soon people realized that the reproduction of the same unseen power of institutions was going on, increasing governmental indifference and civic apathy. The dilemmas of governance were exchanged from one political colour to another, without significant solutions, proving the bareness of political life beyond the arithmetic of the winning or losing votes. In Eastern Europe, after a long and paralyzed political life, ex-communist leaders or ex-members of the communist youth league came to defend the name of democracy and play an important role in European integration. Those who once "fought" against the wrongs of capitalism are now benefitting from its ease and luxury, sustaining whole-heartedly the principles of the free economy. Travelling from one ideology to another has become the "wisdom" of the political survivor, this self-confident character of the present-day populist masquerades for whom political representation simply means the art of staying in power.

The absence of common coalescent cultural dimensions in Europe tells a lot about inertia in political life, the lack of involvement of the less and less informed and educated electorate of the EU countries. The West has abandoned since long any pretensions of moral and/or spiritual leadership. Without attempting to disparage the success of the social assisting policies in Western Europe especially, it has been rightfully said that such policies created citizens who do not only lack personal responsibility, but they cynically recognize their dependence on the hard-working tax-payers who have thus an extra weight to carry on their shoulders. The exclusively materialist preoccupations downplayed on other needs of the modern society, namely the preservation of civic virtues rather than those which sustain affluence and gentrification. The present-day value system in the transatlantic world is entirely focused on material wealth, on the dialectics of "skills" and "competences", reducing the world and society to a "market" and its lucrative needs. The

uprooting of the European intellectual traditions and the surrender of the young generation to the laxity of entertainment, in the pleasant void of ideal(s) accounts for the moral confusion and indifference of the present, paving the way to future civic indifference and possibly inner conflicts. The other face of the extension of liberal and egalitarian politics of rights is nihilism. The effacement of the voice of the critical intellectuals provides social criticism with a light, almost playing versatility which may change from protesting against homophobic attitudes to protesting against the degradation of the natural environment, ridiculing thus moral and political involvement. Actually, the present is replenished with the ideological ersatz of the everyday discontentment, clothed in anti-emigration slogans, urging violent behaviour against the new scapegoats of the crisis. The lack of communication in the Western society is the consequence of the willing narrowing of the human individual to a *factor*, seen in its required capacity to adapt to the rationality of the “market”. The very idea of the future has been transformed in a perfectly planned and controlled evolution in which futurity is the wishful prolongation of the present, thought to be “good” in accordance to what experts decide in their ivory towers far from the “madding crowd”. Paradoxically, due to social engineering, future has become a phantasm. In fact, the engineering of the future in the absence of values has turned into a bureaucratic activity lead by a handful of managers who confound their jobs with a social duty.

The worldwide economic contraction starting in 2008 emphasized the risks of the alienation of individuals and fragmentation of the European society, augmenting the frustrations from the left to the right and back, testifying the steel grip of the huge bureaucracy which steers Europe. As if this was not sufficient for the pressure and weight of the economic crisis, another crisis added itself to the economic contraction. It is the crisis of the European enlargement which has manifested itself not through open conflicts, but rather by the loss of the steam in the deepening of European integration, by getting into a forefront contact with Russian interests. The extension of the EU to the East would have needed perhaps a longer preparatory period, as far as the inclusion of the Republic of Moldova, Georgia and Ukraine is regarded. Russia’s clear signs of nervousness have been noted since the governmental crises in Ukraine, at the beginning of our new century and probably they will be transformed into vehement warnings, hopefully not into military actions. The possible uniting of Republic of Moldova with Romania will certainly not be

accepted full-heartedly by Russian politicians, so that, repercussions of this possible union should be carefully analyzed firstly from the point of view of economic and energy strategies. But, even if the two countries will not decide to unite in one European state, their co-existence in the Eastern part of Europe may intensify outside economic and political pressures and bargaining for the way in which the border of the EU will function next to Ukraine or, possibly next a new Russia, bereft of Ukraine and Georgia. The European project did not confront itself with the problem of territorial magnitude. After WWII, for the "fathers" of the European project the size of Western Europe counted less than its new spirit, but now it is the territory which seem to influence the new spirit of the EU, since the territory wherefrom votes are numbered legitimizes the spirit. It will be shown that in the "making" of Europe, moving away from the Seine or Rhine to the mouths of the Danube, or even farther on, not only the natural landscape changes, but also the spirit of Europeanization. This is why as for now, when the "spirit of Europe" has been blown into new spaces, so to say, the dimension of the EU weighs heavily on millions of European citizens' "good life". If the ideal of EU was the attainment and the preservation of such a peaceful good life, then the whole European project should be substituted by a new one, a more politically oriented one, demanding from Europeans a clear attachment for the new frontiers of the EU.

Sailing to the east, after the fall of the communist regimes, was not only an enthralling perspective for the unification of Eastern European states and nations, but a compelling condition to their modernization and democratization. A huge cultural transmutation has occurred in Eastern European countries in these years, doing away not only with the experience of dictatorial communism, but also with poverty and corruption, at least pretending to do so with the latter two worrying problems. As the advancement of the integration is by now transmuted into a mandatory and pressing consolidation of the EU, one sees exigent conditions to be implemented for all EU members, including Romania. I am not saying that Romania as well as Bulgaria, for instance, are not able to carry out their tasks of becoming consistent with European mainstream obligations, but the problem of being ready to *act* as a European country may turn into a nightmare, because of economic costs and due to the lengthened consolidation process. New types of relations may well develop between strong and weak European states in the time needed for the

latter ones to adjust, or in the time needed for the first to procure the financial liability to support the adjustment for those falling out of the line. The question of *time* appears not only as a problem of political willingness to achieve to the letter all tasks, but also of capability, of aptitude and efficiency, which brings us to an aspect less debated in the march of enlargement, namely that of “European” virtues. Speaking about “virtues” in a postmodern, relativist context may betray a conservative bias, a reluctant attitude toward the so-called “constructivist” approaches of the present which denied the resistance of the past in the name of the “rational” spirit of the European future. The vital question is whether the EU has got “superior virtues” to be embraced all Europeans, and to be embraced by all of them, to inspire, comfort, strengthen and motivate them in order to sustain the reality of unification. Evasive, confusing answers reiterating the need for more “reason”, “solidarity”, “European spirit”, continuity of peace, etc., suggesting that European virtues are less important than laws. True, the building of the EU started on the foundations of virtues, virtues of peace, friendship, progress and solidarity, but they were abandoned soon, for the game of power and “Eurocratic” Europe, an administrative union, rather than political union of ideals and virtues. The fact that the beliefs of the EU citizens are not freely voiced in an EU civil society makes the EU less trustworthy. Naturally, virtues are not born without experience, so probably the so much talked about virtues will appear one day, after the European Federation is born, but then why are European states so strong and far from showing the slight intention of ceding their power to federalist organisms? The symbolism of the EU will grow probably weaker without the implementation of the virtues of being a European, making the Western world more vulnerable.

In this respect, the other great drawback in the Western world, besides the absence of European virtues in edifying a new Europe, is the low credibility of American democracy. The appeal of American democracy has diminished considerably since the end of the last century. Starting from the successful ideology of liberalism, moving to the status of a regional power and then to that of a global one, USA are at the present moment the very power of the world, and at the same time the loneliest county in the world, a paradoxical situation to match the mythical, exceptionalist status of Americans. Surprisingly, America needs more allies than ever in order to reduce the price of exposure

to belligerence. Paradoxically, the American superpower is dependent on a network of friends and allies, which asserts the formidable aura of the American sovereignty. Sharing almost the same geopolitical interests, having a common Christian culture, condemning terrorism though not with the same means, the two pillars of the Western world, the EU and the USA are aware that their growing apart might undermine their own statuses. The lowest credibility of American democracy has been reached paradoxically after the momentous victory against communist ideology and the freeing the Eastern Europe from the ghosts of Stalinism and national communism. More confident than ever in their inner and international policies, the USA have reached in the 1990s one of the peaks of economic growth which made investors and banks aspire more greedily to new skyrocketing profits, demonstrating the whole world, even for a short period what Americanism has always looked like. Sooner than one could think, economic recession came into view, reaping what was sowed in the fat years of affluence. The history of economic crises in the USA shows a discouraging fact, namely that affluence cannot be egalitarian and not even democratic. The correlated images of growth and destruction of affluence, both featuring capitalism in the 18th century as in the 21st have the same the end of the story, namely the impossibility of reconciling the unpredictable character of the economic crises with the advantages of democracy.

Nevertheless, in spite of all democratic imperfections, the consistency of the democratic past of the USA cannot be compared with the other totalitarian past of great international actors as for instance Russia and China. Perception of the American democracy outside America has put American politicians under strain since the beginnings of the North American republic. Indeed, as the democratic experience of the world was contained into a relatively small number of countries, among which, Great Britain and France, the USA was often seen in the past as a diverging country from the mainstream of civilization's only cradle: Europe. Ironically, it was in the 20th century, when the USA had become the defender of free and democratic Europe that the real tensions between Europe and the USA commenced. The great challenge of the transatlantic crisis is that, that for the moment at least, it is unthinkable for the USA to imagine an alliance with another great entity as the EU, without jeopardizing American interests in the world. The same could be said about the EU living without the comforting American military power. The duality of

rapproches between the EU and USA, between love and hate, esteem and lack of esteem has envenomed since a long time strategic relations between the EU and the USA. The American intervention in Iraq provoked a chorus of European protests, as known, showing the hesitations of the Western Europe leaders in the face of terrorism, proving that European investments in the Arab countries are highly lucrative. The consequences of European anti-Americanism are dangerous not only because they undermine the symbols of an old democracy, but because they point to the crisis of democracy in the Western world, namely that representation of democracy is a question of power and not of a unique programmatic ideal. As the hunt for the Al-Qaeda leader went far into the Pakistan and the Arab spring tested the ability of the Obama administration to deal with a changing of the world, the issues of the representation of democracy in the Near East are more urgent, pointing to what still binds the transatlantic world, the reality and symbolism of democracy.

Instead of a conclusion, the alteration of the quality of democracy may be the most serious threat of the present, eventually causing a global imbalance grounding the comeback of international anarchy.

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SIMILARITIES AND DIFFERENCES IN TRANSATLANTIC LEGAL HARMONY: THE PARADIGM OF AMERICAN AND EUROPEAN CONSISTENCY OF THE LAWS IN HUMAN RIGHTS AREA

Dr. Doina Micu

Associate professor

Babeş-Bolyai University, Cluj-Napoca, Romania

doina7mi@yahoo.com

Oana-Georgiana Hanc-Scherer

M.A. in Transatlantic Studies

oanascherer@yahoo.com

Abstract: *The protection of the fundamental rights as they are provided in the constitutions of the states is considered to be a constitutional protection. Those rights are also guaranteed by the constitutional guarantees, like the check and balances principle and the rule of law. However, these rights are also protected at the international level as human rights. We will focus our study on the USA's constitutional Bill of Rights, the EU Charter of Fundamental Rights and Freedoms, the European Convention of Human Rights. Our analysis will focus on the similarities and differences that exist in the judicial review activity of the courts competent to assess human rights legal disputes. The paradigm that characterizes these transatlantic courts' activity, that establish the legal harmony in human rights and fundamental rights area might be considered a constitutional and federal standard according to which the consistency of the laws is realized.*

Keywords: legal harmony, consistency of the laws of human rights, paradigm

There is a requirement of consistency which is deeply rooted in law. The rule of law requires that laws be applied equally, without differentiation. The courts have embraced the principle that decisions must not vary and the law of precedent tries to make sure that similar cases are treated alike. Inconsistency is one of the most frequent manifestations of unfairness that a person is likely to meet. A person who was discriminated on the grounds of race, gender and other reasons should be able to rely upon some legal remedies. The question is to what extent the courts, in exercising their judicial review function, provide a remedy when public bodies act inconsistently (Steyn 1997).

In the United States, the judicial function at the federal level is fulfilled by a hierarchy of federal courts, including district courts, circuit courts of appeal, and the

United States Supreme Court. The Supreme Court has jurisdiction to consider the constitutionality of laws and of executive acts and decisions, both at the federal and at the state level. Each of the 50 states has its own constitution, legislature, executive government and court system. Leaving aside the institutions of local government, state authority in the United States is made up of 51 legislatures, systems of law, governmental structures, and judicial institutions (Robbers 2007).

The Supreme Court is the highest court in the United States and the final interpreter of whether the laws and actions of the United States government are permissible under the U.S. Constitution. It sits at the top of the federal court system. It is made up of nine judges, and is presided over by the Chief Justice. The U.S. Supreme Court hears appeals from the state and federal courts. If a case that reaches a state supreme court involves federal laws or rights, the losing party can ask the U.S. Supreme Court to review the decision of the state supreme court (Brannen 2005).

There is a limited amount of work the Supreme Court can do in one year, so it has a procedure for deciding which cases to review. The losing party in a federal circuit court of appeals or in a state Supreme Court can begin the process by filing a document called a petition for a writ of certiorari.¹ In the petition, the party asks the Supreme Court to review the case, explaining why the case is important enough to deserve the Supreme Court's attention (Brannen 2005). Every year, about 8,000 litigants think that their cases should be heard by the Court, but the justices agree with fewer than 100.² The Court cannot give careful attention to that many cases, so the justices choose a very small percentage of the total for full review on the merits and deny the remainder (Neubauer, Meinhold 2010).

Justices decide not to hear a case for many reasons. They may conclude that the decision of the lower court was correct. They may feel that the case has no national significance. They may even determine that the Supreme Court does not have jurisdiction in a particular matter. If the Supreme Court decides not to hear a case, then the decision of

¹ A writ is a court order, and certiorari is a Latin word that means "to certify a court case for review."

² From the 8,000 certiorari petitions that are filed each year. Approximately 2,000 are "paid" petitions (there is a \$300 docketing fee). The other petitions—about 6,000 each year—are "in forma pauperis" petitions filed without fee, almost entirely by prisoners complaining of claimed errors in their trials.

the lower court is final (Wagner 2007). A small percentage of the petitions make it past this initial stage (Wagner 2007).

The process begins with appeals and writs of certiorari being considered by the justices individually. Usually, they ask combined clerks from the participating justices' offices to analyze the many petitions and write memos summarizing the details of each one. Those memos then circulate to all participating justices (Wagner 2007). Some of the justices then have one of their own clerks reviewing the pool memo. Although the clerks make recommendations about which cases should be granted review, the justices sometimes ignore their recommendations. Given that the vast majority of all cases reviewed by the clerks would likely be rejected anyway, it is doubtful that many important cases are overlooked because a clerk failed to recommend granting certiorari.

After individual review, the Court conducts a collective review of all the requests. At a weekly conference, the justices discuss and vote on the petitions. Before each weekly conference, the chief justice circulates a discuss list containing the cases considered worthy of conference time. All other requests are automatically denied, unless a justice specifically requests that a case be put on the conference agenda. The Supreme Court will not agree to hear a case unless at least four of the Court's nine justices vote to review the lower-court ruling. This procedure is referred to as the rule of four.

A denial of certiorari leaves the ruling of the lower court undisturbed and formally means only that the Court has decided not to decide the case. Thus, a denial of review does not mean that the Court agrees with the outcome of the case in the lower court and, therefore, carries no significance as a legal precedent. Sometimes the media are reporting denials of certiorari as if the Court were agreeing with the lower-court decision.

An important feature of the initial review process is that the law clerks and the justices have considerable discretion in determining which of the cases will be decided by the Court. The Court does not seek to correct every injustice that may have occurred in the lower courts but, rather, tries to decide a select group of important cases. Most of those cases involve issues over which the lower courts have reached conflicting results. This power to decide what to decide enables the Court to set its own agenda (Neubauer, Meinhold 2010).

After the Court accepts a case for review, the lawyers for both parties prepare written briefs. Through these documents they organize all possible relevant legal principles and precedents for their side of the case. They bring evidence to support their interpretations of constitutional provisions and statutory language, particularly discussing relevant Supreme Court decisions. The Supreme Court rules limit briefs to a maximum of fifty pages (Neubauer, Meinhold 2010).

Interest groups and the government often file *amicus curiae* briefs as well, each offering a position on how the controversy should be settled. These briefs differ significantly from the primary briefs of the two parties. They are usually filed by groups that are interested in preserving or extending certain legal principles rather than in the outcomes of the specific cases they are addressing (Hall 2004).

After the justices have read the briefs filed by the opposing sides in a case, they set a date to hear oral argument. It generally takes at least three months between the time the court agrees to review a case and the scheduled oral arguments. In their oral arguments, the attorneys for each party present their side of the case. The time allowed for oral argument is also strictly limited. Except in cases of extraordinary public importance, each side is given thirty minutes, which the attorneys for the parties may, if they wish, share with counsel for interest groups who have filed amici. The lawyers come prepared with arguments they wish to present, but rarely do they get very far before they are forced to respond to questions from the justices. Thus, the justices control the direction of oral argument.

Responding to questions is difficult, because the lawyers are arguing not to a collective court but to nine individual justices. Attorneys are aware of the justices' voting patterns and seek to assemble a coalition of five justices in their favor. In turn, the justices use oral argument to help them reach a final decision. Oral arguments are not televised or broadcast simultaneously, but the transcripts and audio recordings are later released by the Court to the media.

Two or three days after oral argument, the justices assemble in private to discuss the cases recently argued and to take a tentative vote. Only the justices attend the conferences, which are not open to the public or to other Court personnel. Conferences serve to discover consensus.

The chief justice presides, opening the discussion by reviewing the facts of the case, stating the decision of the lower court, outlining his (or her) understanding of the applicable case law, and stating how he (or she) thinks the case should be decided. Next, the associate justices present their views in order of seniority (determined by years of service on the Court). When the discussion ends, the chief justice gathers the votes in what is called the “original vote on the merits.” (Neubauer, Meinhold 2010, p. 487). Supreme Court decisions are made by a majority vote and in case of a tie the lower-court decision is upheld.

After the justices vote on a case in conference, they must decide who writes the majority opinion stating the legal findings of the Court. If the chief justice votes with the majority, he either writes the opinion himself or assigns it to another justice who has voted with the majority. If the chief justice dissents in a case, the senior justice who voted with the majority either writes the opinion or assigns it. The majority opinion is the most important written opinion in each case and is always printed first (Hall 2004).

The justice who writes the majority opinion has substantial control over its content and can influence the future development of the law on the subject. The author of the Court’s opinion, however, is not a free agent; he or she must also satisfy the views of at least four other justices. In cases with a minimum winning coalition, the justice closest to the dissenters may be selected, because he or she is viewed as the person most capable of writing an opinion that will maintain the initial coalition (Neubauer, Meinhold, 2010). By a self-imposed rule, the Court decides every case argued that term. On rare occasions, cases have been held over to the next term, sometimes for reargument. When the opinion is ready, it is announced from the bench, and copies are made available to the public. The opinion is, in essence, the court’s legal explanation of its vote. It explains what the court saw as the legal issues in the case and the precedents, or previous legal rulings, on which the court’s decision was based. The purpose of opinions is to explain the legal reasoning that led to a decision and are significant because will be used to affect future legal decisions in other courts (Wagner 2007).

The Supreme Court decisions operate at two levels: results and reasons. The results settle the dispute between the parties by announcing the Court’s decision on how to resolve the controversy. Through the reasons, the justices develop the law, providing directions for

how the lower courts should decide similar cases in the future. In an opinion of the Court, a majority of the justices agree not only on the result but also on the legal reasons for that outcome.

At times, no single opinion is joined by five or more justices. In that event, the opinion is known as the plurality opinion of “justice”. A plurality opinion, although decisive for the parties, is usually not regarded as having strong precedential value. Some decisions include concurring opinions, whereby a justice agrees with the results reached by the majority but disagrees with the reasoning used to reach that conclusion. Finally, justices may disagree with the Court’s decision and write a dissenting opinion. Dissents serve to keep the majority honest. They point out the weaknesses of the decision and, even if the decision is not later reversed, may persuade future courts from extending the argument made in the case.

Generally, dissenting opinions are not as legally significant as the majority opinion, because they do not form a precedent that justices feel obliged to follow in later cases. A dissenting opinion might later prove influential by informing the majority opinion in following cases, giving justices who are not in the majority a chance to have great influence on future Court decision making (Hall 2004).

The legal system of the United States complies with the rule of law in the sense that all governmental powers, including those of the legislatures and executive institutions, must be subject to the substantive and procedural provisions of the federal and state constitutions. On the other hand, the individual rights provisions of the United States Constitution lack the measure of precision. Given the wide powers of interpretation of courts of law, the United States Constitution is more inclined to a government of judges, rather than to strict constitutionalism (Robbers 2007).

The 1789 U.S. Constitution is a cryptic document outlining formal matters such as the composition and legislative powers of Congress, the election and functions of the president, the institution and jurisdiction of courts of law, autonomy of the states and admission of new states to the union, amendment of the Constitution, and the status of international law in the United States. In 1791, 10 amendments were added to the constitution, the Bill of Rights.

The Ninth Amendment to the Constitution of the United States provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This provision must not be taken to create particular rights of the people but may serve as justification for the U.S. Supreme Court to define rights not expressly mentioned in the Constitution and constitutional amendments. The amendment has been invoked, for example, to proclaim a right to privacy as the basis for declaring the right of women to an abortion (*Roe v. Wade*, 1973).

*Roe v. Wade*³ 410 U.S. 113 (1973) has been one of the Supreme Court’s most controversial decisions, which protected women’s right to abortion as part of the right to privacy and thus declared state criminal abortion laws to be unconstitutional. Therefore the Supreme Court can strike a law down as unconstitutional. In *Roe v. Wade* 410 U.S. 113 (1972), the Supreme Court ruled that states cannot ban abortions completely because women have a constitutional right to have abortions in some cases. After that decision, states rewrote their abortion laws to ban abortions in situations allowed under the Supreme Court’s ruling. For example, most states ban abortions during the last three months of pregnancy unless the abortion is necessary for the health of the mother (Pollock 2009).

American constitutional history has been spoiled by institutionalized racial discrimination. After the judgment of the U.S. Supreme Court in the case of *Plessy v. Ferguson*⁴ 163 U.S. 537 (1896), the doctrine of “separate but equal” was applied in public education to uphold the constitutionality of racially segregated schools until the U.S. Supreme Court in *Brown v. Board of Education*⁵ 347 U.S. 483 (1954) held that separate educational facilities were unequal. This decision set the tone for an effort to outlaw racial segregation in schools, thus overturning decades of segregation in the U.S. South, and to eradicate all manifestations of racism in the laws and practices of the United States.

Although great progress has been made over the years, racial differences in average levels of education, economic means, and living conditions are still evident. The issue has been complicated by the dramatic increase in racial and cultural diversity due to massive immigration from South America, the Caribbean, Asia, and Africa.

³ 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

⁴ 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

⁵ 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

The U.S. Supreme Court incorporated most of the provisions of the Bill of Rights in the general language of the Fourteenth Amendment, prohibiting the states from abridging “the privileges or immunities of citizens of the United States,” and from depriving “any person of life, liberty, or property, without the due process of law.” Certain provisions of the Bill of Rights have not been incorporated. The U.S. Supreme Court has decided against incorporation in the case of the right to carry arms, the right to a grand jury indictment in criminal cases, and the right to a jury trial in civil cases. The U.S. Supreme Court has not made a ruling as to the incorporation of the right not to have troops quartered in one’s home or the prohibition of excessive fines. Through incorporation, the other Bill of Rights provisions were made applicable to the states via the Fourteenth Amendment (Robbers 2007).

Constitutional protection of human rights in the United States is in essence founded on a libertarian system. In case of a conflict between different constitutional rights and freedoms, the courts always attempt to “balance” those conflicting rights. In terms of the doctrine of “preferred freedoms,” the courts would find it easier to hold that legislation limiting the First Amendment freedoms (freedom of speech) is unconstitutional than it would, for instance, if the economically qualified rights enunciated in the Fifth and Fourteenth Amendments (protecting property rights) were at stake (Robbers 2007). The American Bill of Rights only affords protection to civil and political rights and does not contain express guarantees of the basic natural rights of the human person, such as the right to life and to human dignity. Under its federal system, the competence to deal with these matters is within the jurisdiction of states. Because of that, the United States has been condemned by the Inter- American Commission on Human Rights for not upholding the principle of equal treatment in respect of the most basic human rights and fundamental freedoms.

The rights and freedoms protected by the Bill of Rights are drafted in general language permitting the U.S. Supreme Court to reinterpret and to expand the general provisions of the Bill of Rights so as to accommodate the Court, a fact which makes the constitution quite flexible (Robbers 2007). Much of the Constitution is written with too general words such as “due process,” “equal protection,” “freedom of speech,” “establishment of religion,” and “commerce among the states.” This kind of language

requires interpretation as applied to specific cases. Justices may differ on the proper weight to be given to the text in interpreting the Constitution, the views of the document's drafters ("original intent"), the post-enactment history of the text ("tradition"), and the prior decisions of the Court (stare decisis or jurisprudence, precedent). A Justice may also be influenced, consciously or unconsciously, by his or her personal ideology, particularly a Justice's view of the proper role of the Supreme Court in a democratic society (Pollock 2009).

Courts decide alleged violations, disputes arising under the law. This often requires that they interpret the law. In doing so, courts consider themselves bound by how other courts of equal or superior rank have previously interpreted a law. This is known as the principle of precedent. It helps to ensure consistency and predictability. Higher-level courts try to resolve these inconsistencies. The Supreme Court of the United States often chooses to hear a case when its decision can resolve a division among the Circuit courts. The Supreme Court precedent will control, or apply to all the lower federal courts. In *United States v. Balsys*,⁶ 524 U.S. 666 (1998), the Supreme Court ruled that fear of foreign prosecution is beyond the scope of the Self-Incrimination Clause. This ruling became the law of the entire nation, including the Second Circuit. Any federal court subsequently facing the issue was bound by the high court ruling in *Balsys*. Precedent also applies in the various state court systems (Outline 2004).

The federal and state courts are required to extend "full faith and credit" to each other's respective judgments. However, under the Supremacy Clause of the Constitution, a federal law preempts any state law that is in conflict with it (Hogan 2010). When the High Court overturns past and controlling precedents when it decides a case, this practice is one of self-restraint. If the Supreme Court was bound by the dictates of its prior rulings, it would have very little flexibility. By occasionally allowing itself the freedom to overrule a past decision or to ignore a precedent that would seem to be controlling, the Supreme Court establishes a corner of safety to which it can retreat. When the Court changes direction or keeps an open mind, this principle of self-restraint is put to use (Outline

⁶ 524 U.S. 666, 118 S. Ct. 2218, 141 L.Ed.2d 575 (1998)

2004).⁷ The Supreme Court has a role as a policy maker which derives from the fact that it interprets the law. Public policy issues come before the Court in the form of legal disputes that must be resolved. An excellent example may be found in the area of racial equality.

The U.S. Supreme Court, in *Plessy v. Ferguson* 163 U.S. 537 (1896), upheld the Louisiana statute. Thus the Court established the “separate-but equal” policy that reigned for about 60 years. During this period many states required that the races sit in different areas of buses, trains, terminals, and theaters; use different restrooms; and drink from different water fountains. African Americans were sometimes excluded from restaurants and public libraries. Perhaps most important, African American students often had to attend inferior schools. Separation of the races in public schools was contested in the famous case *Brown v. Board of Education* 347 U.S. 483 (1954). Parents of African American school children claimed that state laws requiring or permitting segregation deprived them of equal protection of the laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities are unequal and, therefore, segregation constitutes a denial of equal protection. In the *Brown* decision the Court overturned the „separate but equal” doctrine and established a policy of desegregated public schools.

In a democracy, broad matters of public policy are presumed to be left to the elected representatives of the people, not to judicial appointees with life terms. Thus, U.S. judges are not supposed to make policy. However, in practice judges cannot help but make judicial policy (Outline 2004). The Supreme Court is more than a legal institution, it is a hybrid one and its decisions have important political, social, economic, and cultural consequences. The Supreme Court represents an evolving America.” (Wagner 2007, p. 91) Many Americans expect the Court to adjust the Constitution, an 18th-century document, to accommodate their modern lives (Hall 2003).

⁷ Bureau of International Information Programs (2004) *Outline of the U.S. Legal System*. United States Department of State, p. 68.

⁸ Homer Plessy, who was one-eighth black, protested against the Louisiana law by refusing to move from a seat in the white car of a train traveling from New Orleans to Covington, Louisiana. Arrested and charged with violating the statute, Plessy claimed that the law was unconstitutional.

Local judges tried very hard to shape their own decisions so as to provide consistency with that of other regional jurisdictions. Although there is not uniformity, there is general consistency of approach to matters common in most causes of action. Some state and all federal criminal statutes include mandatory sentences that require judges to impose identical sentences on all persons convicted of the same offense. Mandatory sentences are a direct result of state legislatures' or Congress' response to inconsistency in sentencing practices. However, most crimes do not carry mandatory sentences. If sentencing is not mandatory, judges may "fit the punishment to the offender" rather than "fit the punishment to the crime." (Wilson 2006, p. 523). The use of arbitration⁹ has greatly expanded in recent years, because of the fast resolution of disputes, and the relative consistency and near-uniformity in procedural requirements (Wilson 2006).

In an effort to eliminate gross disparities in sentencing, the federal government and many states have attempted to develop sets of precise guidelines to create greater consistency among judges. At the national level this effort was manifested by the enactment of the Sentencing Reform Act of 1987, which established guidelines to structure the sentencing process (Outline 2004). A uniform law was proposed as legislation for all the states to adopt exactly as written, the purpose being to promote greater consistency among the states. All the uniform laws are promulgated by the National Conference of Commissioners on Uniform State Laws (Garner 2009).

On the other side of the Atlantic, inside the EU, the procedure to protect human rights is partly similar (Medhurst 2001). The national courts assess the legal disputes in this area according to their competence, by interpreting the national and international legislation which had been ratified as a part of the law of the land. When those courts encounter problems relating to the interpretation of the EU law, they ask preliminary questions of the European Union Justice Court (EUJC). This procedure (Craig, De Burca 2007) is the most important example of the collaboration between the national courts and the EUJC in the adjudication of the cases according to the primary and secondary

⁹ Arbitration refers to one of several methods, collectively referred to as "alternative dispute resolution" (ADR), for resolving legal disputes other than through a formal court system. Arbitration is very similar to a trial in court, except that the claims and defenses are presented to a privately-retained neutral party ("arbitrator" or "arbiter") rather than a judge or jury.

legislation (Reinish 2009) which have to be consistent (Borchardt 2010) with the legislation of the Member States. The binding force of preliminary rulings applies to all relationships governed by the EU law, due to declaring pre-existing law, not due to the precedent doctrine (Chalmers, Davies and Monti 2010) as is the case in USA. The final decision will be issued by the national court based on the interpretation of EUJC. The next case demonstrates the substance and procedure of the internal judicial review (Turk 2009; Schutze 2012). It refers to a preliminary ruling concerning Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security in the Member States of EU. Those references were submitted by the Belgian court, in the context of proceedings between Ms Jonkman, Ms Vercheval and Ms Permesaen and the National Pensions Office (the 'NPO'). Ms Jonkman, Ms Vercheval and Ms Permesaen, after having worked as air hostesses for Sabena SA, a Belgian airlines company, brought an application for a retirement pension as civil aviation air crew. They brought those claims in 1992, 1995 and 1996, in order to obtain their pension rights from 1 March 1993, 1 July 1996 and 1 February 1997 respectively. The NPO granted them a pension. However, Ms Jonkman, Ms Vercheval and Ms Permesaen disputed the decisions of the NPO before the Brussels Labor Court, arguing that the calculation of their pensions was based on discriminatory provisions and that they should receive a pension calculated under the same rules as those applicable to male cabin crew. Specifically, it followed from a comparison of the notes on the calculation in their pensions that the amounts of remuneration taken into account by the NPO were, in respect of the period from 1 January 1964 to 31 December 1980, significantly less for air hostesses than for air stewards, despite the fact that their basic remuneration was equal. That was explained by a difference in treatment during the abovementioned period between, on the one hand, the air hostesses and, on the other hand, the other cabin crew members. In fact, by a Royal Decree of 10 January 1964 determining the contributions intended for the financing of the retirement and survivors pension scheme for civil aviation air crew, and the detailed rules for their payment which entered into force on 1 January 1964, a special retirement pension scheme was introduced for the benefit of civil aviation air crew, from which air hostesses were nevertheless excluded. The latter remained subject to the general retirement pension scheme applicable to employed persons, which was characterized by

account being taken, in respect of the collection of contributions and the calculation of the pension, of a smaller percentage of remuneration than that which served as the basis for the calculation in the special scheme for civil aviation air crew. The reason for the exclusion of air hostesses from entitlement to that special retirement pension scheme lies with the impossibility for them at that time to continue their career as members of an air crew beyond the age of 40. They could not therefore complete a full career. On those grounds the Kingdom of Belgium decided not to include them in the special scheme established. The referring court is correct (in the opinion of EUJC) in asking its questions with regard to Directive 79/7/EEC, which applies to statutory schemes on social security, including statutory pension schemes as the EUJC's Case C-154/92 *van Cant* [1993] shows. The applying EU law is Article 4(1) of that directive prohibits any "discrimination whatsoever on ground of sex ... in particular as concerns ... the scope of the schemes and the conditions of access ..., the obligation to contribute and the calculation of contributions [and] the calculation of benefits". That provision can be relied upon by an individual before national courts in order to have any national provision not in conformity with that Article misapplied. The referring court is essentially asking whether Directive 79/7/EEC precludes a Member State, when it adopts rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex, from making such membership conditional on payment, in a single sum and together with interest at the annual rate of 10%, of adjustment contributions consisting of the difference between the contributions paid by the persons originally discriminated against during the period over which the discrimination took place and the higher contributions paid by the other category of persons during the same period. The ruling of the EUJC which gives the interpretation of the EU law is in favor of the legislative compliance, consistency between the national law which has to be changed so as to comply with Community law, as soon as possible and that the rights which individuals derive from Community law are given full effect.

The external judicial review (Toner 2004) refers to the activity of the European Court of Human Rights (ECtHR) which interprets and applies the European Convention of Human Rights (ECHR) as the standard law for the Member States of the Council of Europe. This review of consistency between national laws and the ECHR is meant to

harmonize the conflicting national laws with the European standard in human rights. The binding interpretation of the ECHR, found in the decisions of the cases ruled upon, where the states as defendants violated the fundamental rights of their citizens has its power in the doctrine of the judicial precedent and it is similar with the American explanation of the decision making power of the US Supreme Court. What differs is the position of the States who accept their international/European responsibility in a horizontal relationship with an individual complaining of the violation of the right provided in the ECHR. As an example we refer to the case originated in an application against the Republic of Austria lodged with the ECtHR by two Austrian nationals, Mr. Horst Michael Schalk and Mr. Johan Franz Kopf in 2004. The applicants alleged in particular, that they were discriminated against as being a same-sex couple, they were denied the possibility to marry or to have their relationship otherwise recognized by law. At the national level the competent courts dismissed the complaint based on Article 44 of the Civil Code that recognizes and provides for marriage between “persons of opposite sex”. The Austrian Government, the defendant, alleged that the matter has been resolved and that it was justified to strike the application out of the Court's list. The Court observes that the application in the present case refers to the interpretation of the Article 12 ECHR, which grants the right to found a family; the legal and jurisprudential meaning in the applicants view did not necessarily imply that a man could only marry a woman and vice versa. Referring to the comparison between Article 12 of the ECHR and Article 9 of the Charter of the European Union, the Court noted that the latter has deliberately dropped the reference to men and women. A number of Directives are also of interest in the present case: European Council Directive 2003/86/EC from 22 September 2003, on the right to family reunification, deals with the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. Its Article 4, which carries the heading “family members”, provides: “The Member States may, by law or regulation, authorize the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), ...”; Directive 2004/38/EC of the European Parliament and

Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Article 2 which contains the definition of spouse similar as a legal status to contracted registered partnership). The ECtHR after analyzing the state of relevant legislation in the Council's of Europe member States currently, found no discrepancies or inconsistencies. In conclusion, the Court decides that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage. Consequently, there has been no violation of Article 12, 14 in conjunction with 8 of the ECHR.

This decision is based on the legal consistency applied by the ECtHR when comparing the national law (Civil Code) and the standard: ECHR. It contains also the interpretation of the EU Charter of Fundamental Rights and Freedoms, whose legal provisions complement the applicable law. These two European treaties are the minimum legal standards for the states to conform to, in the area of human rights. The two courts (ECtHR and EUJC) collaborate (Bernard 2004; Chalmers, Davies, Monti 2010) toward the same purpose: the protection of individual rights.

Harmonizing (Toner 2004; European Commission 2010) the legislation and its interpretation, application is the main goal to be achieved and the policy implemented by the decision making power of the federal/European courts. This is an important paradigm that helps nations to act at the same time, individually/differently and similarly at a global scale. It is a legal and jurisprudential method to help develop a policy of global legal standards that harmonize individual rights, states' rights, obligations and responsibilities.

Different by name, territory and procedure, but similar in purpose, the writ of certiorari, preliminary rulings and individual petitions are legal remedies that contribute to the consistency of the conflicting laws, the creation of a uniform jurisprudence at different levels of governance.

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HOLLYWOOD'S WAR ON TERROR IN THE POST 9/11 WORLD

Dr. Raluca Moldovan

Lecturer

Babeş-Bolyai University, Cluj-Napoca, Romania

raluca@euro.ubbcluj.ro

Abstract: The present paper wishes to analyze the way in which some recent American documentaries and feature films have represented the war on terror initiated by the Bush administration after the September 11, 2001 attacks. The focus of most of the examples discussed in this study is the abusive and humiliating treatment of detainees, especially in the Iraqi prison of Abu Ghraib, revealed by the publication of many shocking photographs in the spring of 2004. The investigation of the content of documentaries (Fahrenheit 9/11, Ghosts of Abu Ghraib, Taxi to the Dark Side, Standard Operating Procedure) as well as feature films (Rendition and Zero Dark Thirty) reveals many common points, probably the most important of which being that the reprehensible behavior of American soldiers, far from being a spontaneous and isolated incident, was part of the Bush administration's strategy for fighting the war on terror – a strategy that raised many ethical issues and greatly affected America's image in the world. The long shadow of the legacy of Abu Ghraib will remain a dark spot in recent American history for many years to come, and its cinematic representations will persist in American collective memory as a shameful reminder of one of the nation's most controversial wars.

Keywords: war on terror, film, enhanced interrogation techniques, Abu Ghraib

Introductory considerations: war, trauma and the legacy of Vietnam

Arguably, the September 11, 2001 attacks against prominent American targets – the World Trade Center, the Pentagon and, presumably, either the White House or the Capitol – represent the deepest collective trauma in recent American history. Their magnitude and impact, as well as the suffering they left behind, are comparable with the aftermath of another great American tragedy – the Vietnam war, although the two events evidently have different causes and characteristics.

The present study is not an investigation into the reasons why 9/11 happened, nor is it an overview of the Bush administration policies following the attacks; rather, it is an

examination of how Hollywood,¹⁰ this very faithful mirror of American society, has approached what is commonly known nowadays as “the war on terror” either in documentary or in feature film form.

Certainly, American war films are nothing new: one can find them in virtually every decade since the invention of cinema and their subject matter covers a wide variety of older or newer conflicts; they constitute a genre in themselves, generally defined by critics as “films about the waging of war in the twentieth century, in which scenes of combat are a requisite ingredient and these scenes are dramatically central” (Chapman 2008, p. 8). Generally speaking, American war films tended to have a political, propagandistic dimension, designed to support the war effort, especially when depicting conflicts in which America was directly involved (such as World War I or World War II).¹¹ This tradition was broken after the Vietnam war, which is considered the first televised war or the first “living-room war”, shown in all its gruesome details (Russell 2002; Chown 2008, p. 458). Most of the Vietnam war films were made after the conflict (the notable exception being the infamous 1967 John Wayne vehicle *The Green Berets*, which was slammed both by the public and the critics) and had a critical point of view concerning the war – a fact that places them in the anti-war film tradition inaugurated by Lewis Milestone’s 1930 *All Quiet on the Western Front*.

If the Vietnam conflict was the first televised war, the 2003 war in Iraq was the first digital war, given the fact that virtually all its aspects were documented by the use of camcorders or digital cameras and made available on the internet by all sides involved in the conflict (Chown 2008). No other conflict, with the exception of the Vietnam war, generated more opposition than this one and, in this case, opposition began even before the war started (Dickenson 2008); moreover, the grounds for criticism went beyond the number of American casualties or fatalities, as was the case for the Vietnam war. Given the

¹⁰ The use of the term “Hollywood” here should be understood in its broadest sense as “films” or “motion pictures”; it does not necessarily refer only to those films that were produced or distributed by Hollywood-based studios.

¹¹ For instance, America’s entry in World War II was preceded by a number of patriotic films glorifying the idea of fighting against the evil Nazis; after the Pearl Harbor attacks, Hollywood producers felt it was their duty to support the war effort by making films that celebrated the courage and dedication of American soldiers on various theatres of operation.

abundance of visual material available, the large number of films dealing with this subject matter should come as no surprise.

It should be equally unsurprising that Hollywood, which was always a very accurate reflection of developments in American society, anticipated the tragic events of 9/11 in a number of popular films released shortly before the attacks: for instance, Edward Zwick's 1998 production, *The Siege*, contains uncannily accurate anticipations of the Al-Qaeda terrorist attacks and their aftermath (such as torture of suspected terrorists, extraordinary renditions and secret prisons) (Kellner 2010). Other examples in this respect include William Friedkin's 2000 *Rules of Engagement* or the 2001 blockbuster *Swordfish*; even Ridley Scott's *Black Hawk Down*, released soon after the attacks, can be read as a preview of the US intervention in Iraq in 2003. Films such as this one, or the 2002 thriller *Collateral Damage*, helped build in the popular imagination a consensus that, initially, generated a lot of support for the Bush administration and its decision to invade Iraq in March 2003 through a mechanism explained by renowned German film critic and historian Siegfried Kracauer (1947) in his monumental work, *From Caligari to Hitler: A Psychological History of the German Film*, where he argued that films articulate social, political and psychological content. His close study of German films produced in the interwar period reveals a highly authoritarian disposition to submit to social authority and a fear of emerging chaos; in other words, these films reflected and fueled anti-democratic and passive attitudes that announced the rise of Hitler and the Nazi party.

The first films to approach the war on terror and to try to make sense of its new rules were documentaries. Actually, many of these early documentaries (produced between 2004 and 2006) – including *Fahrenheit 9/11*, *Baghdad E. R.*, *Occupation: Dreamland* – make use of templates for representing warfare established during the Vietnam era. In a similar vein, the Iraqi conflict moved past its initial “shock and awe” phase (marked by the occupation of Baghdad and the search for Saddam Hussein) and degenerated into a bloody and complicated insurgency war. Unlike the Vietnam war, however, the war on terror was prefigured by a Pearl Harbor-type of event which brought the country together in a collective desire to overcome the trauma; but the lack of a fitting conclusion to this event (a fact proven by the current Iraqi quagmire which may require yet another American intervention, despite president Obama's rhetoric to the contrary) posed many of the same

problems as Vietnam in terms of cinematic representation: any film about 9/11 that did not approach the subsequent invasions in Afghanistan and Iraq had to end with images of the Twin Towers burning – hardly a guarantee of good box office returns. Another similarity shared by the cinematic representations of the two conflicts is the fact that film-makers waited quite a long time before releasing films dealing directly with the events: in the case of Vietnam, it was only in 1978 that Hollywood felt prepared enough to face up to the legacy of this conflict (Russell 2002), while the war on terror was given its first cinematic treatment in Michael Moore's *Fahrenheit 9/11* (2004) and it was only approached again in documentaries and feature films after a three-year break. Possible explanations for this long cinematic hiatus have to do, in my opinion, with the collective trauma experienced by the American people on 9/11, which required a certain healing time, with the political climate dominant during the Bush administration and with the evolution of the conflict itself: the more the war dragged on, the more the American people needed some means of making sense of it.

The present study will analyse the ways in which the war on terror has been represented in several documentaries and feature films released between 2004 and 2012, with a special emphasis on the use of “enhanced interrogation techniques” (in fact, a euphemism for torture and inhumane treatment) employed by the CIA and the American military in order to obtain information from prisoners detained in Bagram, Abu Ghraib, Guantanamo or other so-called “black sites”.

The war on terror in documentary form

a. Fahrenheit 9/11 (2004)

Michael Moore is nowadays perhaps the most controversial American documentary film-maker, well-known for his incisive and highly subjective works, from *Bowling for Columbine* to *Roger and Me*. *Fahrenheit 9/11* is by far his best-known and most awarded work (the documentary received the Cannes Festival's highest distinction, the Palme d'Or, in 2004). Moore intended his film to be both an expose of the errors of the Bush regime and an influencing factor preventing Bush's reelection in 2004. Needless to say, the film was much more efficient as the former than as the latter. The film was wildly

popular by documentary standards, but it also triggered fierce criticism, mainly from the conservative right.

The film contains all the elements of what has by now been dubbed “the Moore method”: comedy (when the director drives around the Capitol in an ice-cream van, reading the Patriot Act to the members of Congress), tragedy (Lila Lipscomb’s story about her dead son), infiltration (the original, undoctored copy of George W. Bush’s military record), confrontation (questioning members of Congress on why they refuse to send their children in Iraq) and speculation (wondering what goes on in president Bush’s mind when he sits in silence in the Florida classroom after being notified about the 9/11 attacks) (Dickenson 2008, p. 166).

The documentary is split into two distinctive parts: the first one starts with the contested election of 2000 and goes on to examine the ties between the Saudi royal family and members of the Bush family, while also suggesting that 9/11 was somehow a result of what Douglas Kellner calls “blowback” – “the unintended consequences of unwise policies” (Kellner 2003, p. 30).¹² Moore suggests that the Bush administration used the fear of the people after the terrorist attacks against them, in order to push their own radical agenda and limit constitutional rights in the name of national security;¹³ they also used lies and deception to “sell” the need for going to war in Iraq, building their case on very questionable evidence linking Saddam Hussein to Al-Qaeda (Cettl 2009);¹⁴ as Moore, who is also the narrator, argues, “George W. Bush and the US military invaded the sovereign nation of Iraq, a nation that never attacked or threatened to attack the United States”.

¹² In this case, these unwise policies represent the support given by the Americans to the Afghan mujahedeen in the 1980s, during the Soviet-Afghan war; some of these Islamic fundamentalists were members of Al-Qaeda and used American money and weapons to prepare, among others, the 9/11 attacks.

¹³ Actually, what Moore does in this long prologue is to put forward several elements of a conspiracy theory, including the manipulation of the media by the Fox network, the manipulation of the elections result by the Supreme Court, the deliberate disenfranchisement of African-American voters to reduce the number of votes for the Democrat candidate Al Gore, the manipulation of vote counting mechanisms and, finally, the manipulation of the US Congress itself (Aitken 2009).

¹⁴ Apparently, much of this evidence was obtained by the CIA after using torture (waterboarding) to extract information from one of Bin Laden’s lieutenants, Ibn al-Sheik Al-Libbi.

The second part of the documentary deals explicitly with the war in Iraq; some of the images used by Moore (who did not travel to Iraq himself, but bought footage from various sources) prefigure the huge Abu Ghraib torture and humiliation scandal that would break out about a month after the release of *Fahrenheit 9/11*.

The explanatory model suggested by the documentary focuses on three main themes: illicit manipulation of the electoral system, which helped bring George W. Bush into the White House, institutional impasse brought about by the abuses of democracy operated during the Bush-Cheney administration and the tragic consequences of invading Iraq (Aitken 2009). Moore's documentary also helps establish a theme that would be central to the 2007 and 2008 series of documentaries focusing specifically on the treatment of prisoners at Abu Ghraib and Guantanamo Bay, namely the implications of the Patriot Act on civil rights and liberties (Cettl 2009).

Fahrenheit 9/11 (whose title is a play on Ray Bradbury's novel *Fahrenheit 451*, with the aim of indicating, according to Moore, the temperature at which truth burns) is the first documentary to bring a different version of the war than the one available on nightly news to the American public. It shows the brutality of war, the terrible human cost (a very haunting image is that of a cart full of bloodied bodies of Iraqi civilians, including a young child whose father is desperately asking whether his 7-year old was a terrorist); these images are juxtaposed with a speech made by Secretary of Defense Donald Rumsfeld praising the "humanity" with which the choosing of targets was done – an evident tool used by Moore to expose the hypocrisy of the Bush administration. The documentary also presents short interviews with several American soldiers who appear to consider the whole operation as one big adventure complete with theme songs (among them, Bloodhound Gang's "Fire water burn" is particularly disturbing). As I have argued earlier, these scenes seem to announce the callous attitude of the American military police in charge of prisoners at Abu Ghraib (Kellner 2010). However, these scenes showing images likely to incite anti-American feelings abroad and to horrify viewers at home occupy a relatively small portion in the second part of the documentary. Moore does not miss the chance to criticize once more the Bush administration, first by showing dishonorable recruiting practices targeting disadvantaged African-Americans and then by bringing forth the role played by the Halliburton corporation (whose chairman of the board had been Dick

Cheney) in the reconstruction of Iraq, after winning some very big government contracts in a highly questionable manner. The film ends on a personalized note – another Michael Moore trademark – by focusing on the case of a grieving mother from Flint, Michigan (allegedly, Moore's hometown), whose son was killed in action and who is trying to make some sense of this tragedy. The film thus draws a parallel between the poor Iraqis who were collateral victims and the poor Americans who had to bear the burden of a hypocritical war and often paid with their lives.¹⁵

Moore's film is undoubtedly a fierce critique of the Bush-Cheney administration, using parody and satire to draw attention to some very grim realities dominating American life in the post-9/11 climate; however, he also raised complex questions about the role of corporate elites and Middle Eastern oil interests. If the film showed American audiences images of the war they would not have seen on network television, Moore also showed them a facet of president Bush most of them were unfamiliar with: he is portrayed as superficial, smug, skirmish, arrogant and mostly inept, a puppet manipulated by much sinister figures such as Cheney and Rumsfeld (Cettl 2009; Kellner 2010).¹⁶ Undoubtedly, such a portrayal earned Moore a lot of criticism, especially coming from the neoconservative right; many of these responses were also in documentary form (one can include here titles such as *Celsius 41.11*, *Fahrenheit 9/11*, *Michael Moore Hates America* and *Michael and Me*). Despite the many voices accusing Moore of cheap anti-Bush propaganda and of serving his own interests, *Fahrenheit 9/11* became probably one of the most influential documentaries in the history of American cinema, its impact being discernible in a lot of subsequent productions, such as *WMD: Weapons of Mass Deception* (2004), *Iraq for Sale: The War Profiteers* (2006), *No End in Sight* (2007), *Ghosts of Abu Ghraib* (2007), *Taxi to the Dark Side* (2007), *Standard Operating Procedure* (2008)

¹⁵ This idea, namely that the poorest members of society serve in the military so that the majority of white, middle-class Americans don't have to, also appears in Robert Redford's poignant 2007 production entitled *Lions for Lambs*.

¹⁶ In this respect, one of the documentary's most powerful scenes is the one in which president Bush was on a golf course with his father; questioned by reporters, he declared that he called upon all nations to do everything they could to stop terrorist killers; a moment later, as if believing that was enough politics for one day, he turned away, golf club in hand, signaling to television cameras, "now watch this drive" (Dickenson 2006).

(Westwell 2013). The next section of my paper will take a closer look at the last three productions, trying to see how they represent the controversial issue of torture and prisoner abuse.

- b. *Ghosts of Abu Ghraib* (2007), *Taxi to the Dark Side* (2007), *Standard Operating Procedure* (2008)

The reason why I have chosen to discuss these three documentaries together is because they deal with the same subject – the abusive treatment of detainees in Afghanistan and Iraq and they all try to address the same thorny issue: whether the contemptible behavior of American soldiers was the spontaneous work of a “few bad apples” or whether this kind of behavior was actually a sanctioned and recommended policy emanating from the highest circles of government. The documentaries also explore the ethical implications of limiting human rights in the name of national security. Moreover, those who are interviewed in the three productions are, by and large, the same people: the members of the military directly involved in the events and various figures connected to the Bush administration.

Chronologically speaking, *Ghosts of Abu Ghraib* was the first of the three to be released, in January 2007, and it was directed by Rory Kennedy (the niece of former president JFK, Robert Kennedy’s youngest daughter); *Taxi to the Dark Side* was directed by Alex Gibney and released in April 2007, while *Standard Operating Procedure*, directed by Errol Morris, was shown in theatres in 2008. In a sense, *Ghosts* establishes a narrative pattern that the two later documentaries will follow. The focal point of all three, however, are the now infamous photographs documenting the abusive and humiliating treatment of prisoners, mainly in the Iraqi prison of Abu Ghraib, but also in other detention centers such as Bagram or Guantanamo. These photos, taken by the perpetrators of the abuse themselves, were first published in the press in the spring of 2004, causing unspeakable outrage in America and abroad, where their publication caused massive waves of anti-American protests throughout the Middle East. These documentaries were the first thorough attempt to make sense of what happened and to try to explain how it was possible

for members of the American military – one of the best trained and equipped armies in the world – to stoop so low.

Ghosts begins with scenes showing the famous 1961 Milgram experiment conducted by psychologist Stanley Milgram at Yale University, investigating people's response to authority and their capacity for obedience: in the aftermath of the Holocaust, what he was trying to prove was that ordinary people would be willing to inflict pain on others when ordered to do so and when they perceive responsibility as being shifted onto that particular figure of authority (Kellner 2010).¹⁷ What the director is trying to show is how the Bush administration, following 9/11, tried to legalize the use of harsh interrogation techniques (or, in CIA parlance, “enhanced interrogation techniques”) to extract information from prisoners of war in the name of national security. One of the people responsible for legally encoding such actions was John Yoo (who also appears in *Taxi*) who, at the time when the new legislation was drafted (2002) was working in the Office of the Legal Counsel. He is mainly responsible for a memo that redefines torture in a very narrow sense to mean only those actions likely to cause organ failure or even death – the implication being that anything else short of that was acceptable. Yoo claims that the provisions of the Geneva Conventions regarding the treatment of war prisoners do not apply to the war in Afghanistan because the Al-Qaeda never signed the Geneva Conventions and, moreover, they follow no conventional rules of warfare. In addition, the detainees did not have the status of prisoners, but that of unlawful combatants, so clearly the Geneva Conventions did not apply in their case.¹⁸

The documentary also reveals the existence of a 2002 memo approved by Donald Rumsfeld, detailing various EITs (such as stress positions, sexual humiliation, etc.) that could be used in order to gather intelligence; the memo even contains a line handwritten by Rumsfeld himself, who commented that he stood for 8 to 10 hours a day, so the fact that prisoners were made to stand only for 4 hours at a time was insignificant. *Taxi* also mentions this incident, but here, Rumsfeld himself dismisses the comment as “a half-

¹⁷ Actually, the results of Milgram's study, although controversial, were rather shocking at the time – they indeed prove that ordinary people can inflict pain on others when ordered to do so. For more details about the implications of this phenomenon, see Bauman, 1989, ch. 6.

¹⁸ In the documentary, this statement is made by Secretary of Defense Donald Rumsfeld.

humorous remark”. In all three documentaries, the largest part is taken up by interviews with members of the American military directly involved in the prisoner abuse scandal, many of whom served time in jail or suffered other kinds of consequences as a result; these figures (Sabrina Harman, Megan Ambuhl, Javal Davis, Lynndie England, Janis Karpinski, Ken Davis) have a similar kind of discourse in all three productions, with minor differences depending on the point they are trying to emphasize. But, overall, the red thread of their defense is that they were merely following orders (like any good soldier would do) and that the whole scandal would have been avoided altogether if the photographs had not surfaced.¹⁹ When the scandal did break out, following an investigation of the Department of Defense, the official result was that the gruesome acts of abuse and humiliation, far from being on official sanction policy (or a standard operating procedure), were the work of a “few bad apples” who had acted alone and unsupervised (although military hierarchy precludes by definition people acting alone and unsupervised).²⁰ Needless to say, none of the documentaries support this point of view; instead, the directors try to demonstrate how specific policies formulated during the Bush administration redefined torture to make it an acceptable and even necessary tool in fighting the war on terror.

The three documentaries employ slightly different strategies to achieve rather similar conclusions. *Ghosts* presents many interviews with the members of the military police who were sentenced as a result of the investigation; that idea that is mentioned over and over again in their discourse is that they were in no position to question anything, they were merely obeying orders, they were working under highly stressful conditions (the Abu Ghraib prison was the target of daily mortar fire and insurgents attacks) and that, after a while, they became numb, they were able to “zone out” the horrible aspects of their daily routine, in those moments, they became “someone else”. Their speeches are juxtaposed with many photos that present undeniable proof of abuse: naked prisoners being walked on

¹⁹ This kind of argument, however, begs the question: if the secrecy of what they were doing to the prisoners was of paramount importance, why would the military police themselves take the incriminating photos? None of the documentaries explores this question.

²⁰ Speaking about this scandal, president Bush expressed his “deep disgust”, while Rumsfeld declared that “the terrible actions of the few are not allowed to define us [the US military]”.

a leash by a grinning Lynndie England, a hooded prisoner made to stand on a box with electric wires attached to his hands, detainees being chained in various highly uncomfortable positions, a pyramid of naked detainees, flanked by smiling American soldiers, prisoners forced to simulate sexual acts while female military police look on – and the list of horrors could go on. This juxtaposition – a technique used by all three directors – begs the question: how was it possible for these rational people to suspend their consciousness and engage in such acts?²¹ The answer is hinted at in *Ghosts* and more explicit in *Taxi*: one soldier actually says “we were told these people were nothing but dogs”. Although the narrator makes no comment upon this statement, the scene is juxtaposed with one presenting images of the Holocaust and from the Nuremberg trials – the suggestion is, of course, more than evident.

Taxi to the Dark Side generally follows the structure of *Ghosts*, but it is more hard-hitting and more comprehensive. The documentary outlines the evolution of the justifications for torture and the problematic results of such techniques (Kellner 2010). The pretext of this investigation is the story of an Afghan taxi driver, Dilawar, who was taken to Bagram detention center, being suspected of collaboration with the Taliban, where he was beaten so severely during the interrogations that he died as a result – the second death of this kind there. The documentary shows how the same team who conducted those interrogations at Bagram was then sent to Abu Ghraib, where they implemented similar methods; no officers were charged at Bagram for the maltreatment of prisoners. The title of the documentary is borrowed from one of Dick Cheney’s statements, where he claimed that dealing with the terrorists would involve taking a trip “to the dark side” (Scott 2008; Kellner 2010). The director, Alex Gibney, makes a history of CIA interrogation techniques and discusses the treatment of high-profile prisoners such as Al-Qathani (the presumed 20th hijacker in the 9/11 attacks) or Ibn Al-Libbi, one of Bin Laden’s lieutenants, while making the point that the CIA obtained the permission to use waterboarding (essentially, a form of

²¹ One of the most disturbing photos is the one presenting Pfc Sabrina Harman standing next to the body of an Iraqi prisoner who had died during interrogation (presumably, as a result of torture); she grins from ear to ear and gives the thumbs-up. When asked about this, she said “I always smile for the camera, it’s just what I do...it’s war, it’s another dead guy, no big deal”. She even expresses mild outrage that she was charged with taking photos that exposed the murder of the prisoner, but those who actually killed him went unpunished.

torture going back to medieval times) from the White House (Kellner 2010).²² To me, one of the most shocking bits of information presented in the documentary is the fact that a survey carried out in the United States soon after the photos from Abu Ghraib were published in 2004 revealed that 35% of respondents believed torture was acceptable under some circumstances. This proves that the Bush administration discourse aimed at creating a climate of fear and insecurity was quite successful in projecting the idea that human rights and the values inscribed in the American constitution could be easily cast aside to serve various political interests (Cettl 2009). The ending of the documentary is equally revealing: the viewers learn that one of president Bush's last acts in office was to issue a decree stipulating that no member of his administration could ever be prosecuted for war crimes (Cettl 2009).

The third documentary in this series, *Standard Operating Procedure*, is to my mind the most complex and original of the three. It also consists of a series of interviews with the same people involved in the Abu Ghraib scandal, but these are, in a sense, more personal and more revealing than their declarations presented in *Ghosts* or *Taxi* a year earlier. Errol Morris relies here on two classic documentary techniques: direct-address interviews and reenactments in which actors restage actual events (Dargis 2008). The film relies heavily on the same photographs taken by the members of the 372nd military police company stationed at Abu Ghraib who were scapegoated for the abuse (Kellner 2010). What is somewhat startling in the declarations made by those who appear in the photos (Sabrina Harman, Lynndie England, Megan Ambuhl, Javal Davis) is that they all appear utterly unrepentant for their deeds (Bradshaw 2008), trying to shift the blame in various directions: England blames her lover at the time, Charles Graner (who received the longest jail sentence – 10 years) and the military intelligence who conducted the interrogations, Harman blames the stressful environment, while the highest-ranking person involved in the scandal, brigadier general Janis Karpinski, the commander of Abu Ghraib prison at the time, claims she had no knowledge of what was going and blames general Miller (the former commander of Guantanamo Bay detention center transferred to Iraq in 2003) for

²² The documentary includes a fragment of a televised interview in which Dick Cheney defends waterboarding.

trying to “Gitmoize” Abu Ghraib (Kellner 2010).²³ One interesting thing about the filming technique used by Morris that he always framed his subjects in tight shots from the shoulders up and often changed the angle of the camera, so that the person appears to be shifting across the screen – a possible suggestion of their own shifting stories (Bradshaw 2008; Dargis 2008; Kellner 2010). The documentary shows how the scandal was a product of the digital age: the photos taken by the MPs allow for precisely establishing the timeline of the events and it introduces an idea already present in the two previous documentaries – no scandal would have occurred in the absence of photographs.

Most of the interviewees testify on their own behalf; in this respect, Sabrina Harman’s case is quite interesting: she also appears in *Ghosts* and *Taxi*, but here she claims she was taking photos so that she could prove that kind of abuse that was going on and to expose the brutality. At the same time, she maintains that her attitude (smiling widely and giving the thumbs-up in the photo showing her next to the dead Iraqi prisoner) was not disrespectful (she only gave the thumbs-up because she “didn’t know what to do with her hands”), while repeating several times during her interview that it [her work in Abu Ghraib] was “kind of fun”. Morris, who conducts the interviews, hardly ever intervenes – he simply lets his subjects talk and allows the viewers to judge for themselves. One other disturbing case is that of Lyndie England, who became instantly infamous around the globe as the pixie-like American soldier walking Iraqi prisoners on a leash: she claims to have been blinded by her love for Graner, she was a mere cog in the military machine (Dargis 2008) and blames him for forcing her to take part in the sexual humiliation of detainees, but at the same time makes a shocking statement: “we didn’t kill them, we just did what we were told to soften them [the prisoners] up for the interrogation”. She also states that “everybody knew” what was going on, while Janis Karpinski goes to great lengths to claim that she had no idea about any prisoner abuse; once more, Morris does not comment on these contradictions and lets the viewers draw their own conclusions. He also fails to put these events in a broader context or to inquire about who was truly responsible for giving the orders; the film includes a few quick shots of Rumsfeld and George W. Bush, but this is all; vice-president Cheney’s name is not even mentioned (Kellner 2010). Despite these possible shortcomings, *Standard Operating Procedure* is an illuminating

²³ Karpinski was taken off active duty and demoted to colonel after the scandal.

investigation of the Abu Ghraib scandal, although the images it brings to light make many viewers wish these had stayed in the dark.

The war on terror in feature films

a. Rendition (2007)

Gavin Hood's political thriller, although somewhat privileging the story over substance (it is, after all, a Hollywood-style feature film with big box office names such as Meryl Streep, Reese Witherspoon or Jake Gyllenhaal) remains one of the first (in feature films) and most powerful representations of the harmful consequences of American Middle Eastern policies (Kellner 2010). The film also explores the use of torture and abuse and represents a stinging indictment against their efficiency in combating terrorism at home and abroad.

The story revolves around an Egyptian-American chemical engineer, Anwar El-Ibrahimi, who is abducted at the airport upon arrival back home, as he is suspected of being involved in a terrorist attack carried out by a radical faction in an unnamed North-African country. The attack claims the lives of dozens of locals and that of a CIA operative who was working together with the local police chief, who was ostensibly the main target of the attack. The plot is complex, made up of different stories of seemingly unrelated characters, whose connections – in a manner similar to other production, such as *Syriana* and *Babel* – are revealed in the end (Kellner 2010). The film follows the efforts made by El-Ibrahimi's wife, Isabella (Reese Witherspoon) to find out what happened to her husband, who seemingly vanished into thin air (because the CIA deleted all his passenger records), the only proof of him ever being on the flight from Cape Town to Chicago being a credit card statement showing some in-flight purchases (Cettl 2009). Meanwhile, Anwar is arrested by the CIA (without being charged with anything) and secretly taken to the North African country where the attack had occurred (all clues point to the fact that this country is Egypt), where he is repeatedly tortured to reveal his connection to the terrorist group.

The film also explores the conflicted relationship between the CIA agent in charge of Anwar's "rendition" (Meryl Streep), the young CIA operative who supervises the torture at the CIA black site (Jake Gyllenhaal) and an ambitious senator's aide who is trying to help Isabella El-Ibrahimi (Peter Sarsgaard) (Kellner 2010), against the background of interrogations regarding the increasing cost to humanity exacted by the increased powers given to the CIA to detain and interrogate citizens after 9/11 (Cettl 2009). Those who condone the use of enhanced interrogation techniques (including waterboarding and electrocution, the first time when these are graphically depicted in a feature film), are authoritarian figures who belong to the older generation (such as Meryl Streep's character), while the young CIA officer eventually understands the futility of torture and releases the prisoner, despite jeopardizing his own career (Cettl 2009).

The film also brings forth the issue of CIA black sites (undisclosed locations where most of these "enhanced interrogations" take place, often with the complicity of local authorizes). In *Rendition*, the CIA officer never does the "dirty work" himself: he merely observes (sometimes indifferently, sometimes horrified) as the local police chief gives the orders for waterboarding and electric shocks. This is actually a way for the CIA to sidestep ethical issues by making use of detention centers operated outside the USA, trying to avoid the constitutional implications of extracting information from detainees. It is probably this proof of moral hypocrisy that enables Meryl Streep's character, Corrine Whitman, to state – when confronted by the senatorial aide who sarcastically suggested sending a copy of the Constitution to her office – "The US does not torture". What I found most chilling in this scene was the passion with which Whitman justifies the need for such methods, after having denied having any knowledge about El-Ibrahimi, arguing that "thousands of people in downtown London are sleeping peacefully tonight because of what we do". The moral confusion between terrorist and terrorist fighter thus becomes very difficult to avoid. What is even more disturbing is that any attempt to intervene in favor of a clearly innocent man (such as Anwar) carries the risk of one being labeled a "bin Laden lover", a certain path to political suicide (Cettl 2009).

The film's conclusion argues that the war on terror is the combined by-product of out of control forces in both the Muslim and the Western world, both of which are spiraling down into barbarism and ethical ambiguity; the only force capable of stopping

this vicious circle are a few young, good man and women ready to break with the policies of the past (Kellner 2010). Although using different methods than the film-makers discussed above, Gavin Hood manages to give us a feature film that is just as powerful and disturbing as any of documentaries analyzed in the previous section.

b. *Zero Dark Thirty* (2008)

Kathryn Bigelow's story of the CIA decade-long hunt for Osama Bin Laden, nominated for an Academy Award in 2013, is probably one of the most controversial films of the decade. It has been a remarkable box office success and has generated both praise and fierce criticism, mostly centered around the idea that the film enhances and somewhat glorifies the role played by torture in finally tracking down and killing bin Laden. Some of the more radical critics (including three US senators) even argued that "the critical acclaim *Zero Dark Thirty* is already receiving suggests that it may do what Karl Rove could not have done with all the money in the world: embed in the popular imagination the efficacy, even the necessity, of torture" (Greenwald 2012). In my opinion, although the film does show many explicit torture scenes, the viewer does not get the feeling that these methods are glorified or that are even credited with the primary role in identifying the clue that led American Navy SEALs to bin Laden's Abbottabad hideout.

The film claims to be "based on firsthand account of actual events" (although, in truth, these firsthand accounts are not identified by name) narrated in a journalistic style; this being the case, the film should project a heightened, almost documentary-like sense of authenticity – which falls short of doing.²⁴ The film starts with a black background while the soundtrack plays real-life recordings of 9/11 emergency calls, and then it fast forwards two years to a CIA black site (presumably in Pakistan), where a prisoner named Ammar (a composite character largely based on Khalid Sheikh Muhammed's nephew, Ammar al-Baluchi) is being held and tortured by CIA operatives who are hoping to find out intelligence about the next Al-Qaeda attacks. One of the CIA agents who is present during

²⁴ In their defense, Kathryn Bigelow and writer Mark Boal argued that their film is actually art and, as such, it should be granted some artistic license – which is fine, as long as their production does not start out by claiming to be a journalistic account, because one cannot have it both ways (Coll 2012).

the initial waterboarding scenes, Maya, the film's main character, first appears squeamish and unwilling to actively participate in the interrogation, but as time passes and concrete results fail to appear, she becomes more desensitized and, ultimately quite indifferent to the cruelty unfolding before her eyes. She even tells Ammar, after a particularly brutal torture scene, in response to his claim that "your friend [CIA operative Dan, the man in charge of the interrogations] is an animal. Please help me" that "you can help yourself by telling the truth".

Indeed, the torture scenes at the beginning of the film are hard to watch,²⁵ but they yield no concrete results: the first mention of Al-Kuwaiti, bin Laden's courier, the one who would ultimately lead the Americans to the Al-Qaeda leader, appears during a conversation between Amman and the two CIA agents, Dan and Maya, which takes place outside the detention cell. I believe that, despite some critics who argue that "this sequence depicts precisely how the CIA's coercive interrogation regime was constructed to break prisoners" (Coll 2013), this scene is actually proof of the fact that the film does not glorify the use of torture, nor does it argue that torture should be given all the credits for the capture of bin Laden. Moreover, after the terrorist attack on the CIA Pakistani base that kills several CIA operatives, one specialist brings to Maya's attention the real name of Al-Kuwaiti, obtained through purely administrative means, after "combing through all the evidence on file gathered after 9/11". Of course, by this time – as the film makes it clear – there was a regime change in Washington: before leaving Pakistan to take up a desk job in Washington, Dan warns Maya in no uncertain terms: "Politics are changing and you don't want to be the last one holding a dog collar when the oversight committee comes". In fact, the film shows on several occasions the fact that the reprehensible interrogation procedures were a direct emanation of the Bush era: during one CIA meeting, one sees president Obama in the background, giving a speech on TV where he emphasizes – echoing Corrine Whitman in *Rendition*, but without the added irony of Hood's film – that "the US does not torture"; later on, when the head of the CIA asks for definitive proof that the one hiding in the Abbotabad compound is indeed bin Laden, a CIA operative tells Dan, "you know we

²⁵ Some critics have argued that these scenes are rough and bland at the same time: Ammar's treatment, shocking as it may be, is hardly rougher than what one can see in TV programs such as *24* or in the documentaries on torture released before the film (Coll 2013).

lost the ability to prove that [bin Laden is hiding in the house] when we lost the detainee program. Whom will I ask now? Some guy in Gitmo who's all lawyered up?". However, the film leaves space for ambiguity here: the last statement actually seems to imply that "enhanced interrogation techniques" were the only means of obtaining information during the previous administration – a conclusion that seems to support the film critics' point of view (Greenwald 2012).

Kathryn Bigelow was praised by many about having been brave enough to include torture scenes in the film, but she was attacked for failing to make it clear how ineffectual and how corrupting these techniques eventually were (Taibbi 2013).²⁶ I would argue that the problem was not that she depicted those scenes – depiction, after all, is not endorsement – but rather the fact that they were included in the context of a thriller in which the audience is clearly expected to support the "good guys" looking for bin Laden. It's true that, unlike documentaries such as *Ghosts* or *Taxi, Zero Dark Thirty* does not condemn torture, but this does not mean that the film glorifies it or preaches in favor of its use: the last scene, showing Maya boarding a plane alone to return to the US after having identified the dead body as belonging to bin Laden, underscores the ambiguity she feels at the end of her mission: instead of the triumphant feeling she might have been expected to display, she appears sad and weary, tears streaming down her face.

In my view, the truly troubling aspect of the film, however, is not its depiction of torture, but its one-sidedness: with one exception (a high-level CIA official who releases the funds to bribe a Kuwaiti official for information), all Muslims or Arabs in the film are seedy, violent and part of a terrorist network; apart from the end scene, all the violence is carried out by Muslims, while the Americans fall victim to it (Greenwald 2012). The only reason the film provides to account for all this violence is given by New York mayor Michael Bloomberg: "they find our freedom so threatening that they are willing to kill themselves and others to prevent us from enjoying it". Of course, the film is political – it can hardly be otherwise; but a film-maker as experienced as Bigelow could have put things in a bit more perspective, rather than using almost every cliché in Hollywood action films,

²⁶ Taibbi (2013) argues that, by exposing the means used by the CIA, the film is ultimately bin Laden's posthumous victory over America, because it led to a lot more anti-American feeling than Al-Qaeda managed to stir with their radical propaganda.

especially considering the cinematic masterpiece she made in 2008, *The Hurt Locker* – possibly the best war film to come out of Hollywood for a very long time (Corliss 2008; Packer 2009).

Zero Dark Thirty lacks both the perspective and the context of the documentaries discussed in the second section of the present paper and the powerful restraint of *Rendition*; it is a controversial representation of the war on terror, one that emphasizes getting the job done rather than the means used to do so. Kathryn Bigelow also gets the job done – a popular box office success nominated for an Oscar, but the means she uses are often clichéd and overly propagandistic.

Some concluding reflections: the forgotten lessons of history

Some sixty years ago, one of Europe's most civilized nations carried out a brutal and systematic extermination in the name of racial purity and of protecting the country from the evil their victims embodied. When the atrocities were revealed, the question that lingered on many people's minds was, "how was it possible? How does a rational human being, endowed with a conscience and the capacity to tell good and evil apart become capable of committing such deeds?" To my mind, part of the answer lies in a kind of brainwashing process by which the perpetrator is repeatedly told that the victim is not, in fact, a human being, but some kind of repulsive and dangerous creature that should be eliminated. Numerous studies dedicated to Nazi racial ideology underline the fact that the Jews were invariably depicted as cockroaches or vermin that should be readily exterminated.

One idea that repeatedly occurs in the films discussed in the present paper, especially in the documentaries, is that the detainees in Abu Ghraib and other places were not human beings, but "dogs" that should be treated accordingly: kept on a leash and disciplined by beatings. One cannot help but notice some very disturbing parallels between historical events separated only by a few decades: in the case of the war on terror, the supreme concern was protecting the homeland from terrorists. This fact overrode all others and redefined the way in which America – the most vocal advocate of human rights and democracy in the world – treated its prisoners.

War always brings out the best and the worst in people: war stories (including those told in cinematic form) are full of episodes of heroism, bravery and selflessness, as well as horrific tales of violence, inhumanity and abuse. Unfortunately, war encourages soldiers to dehumanize and demonize their enemies so that they could be more easily eliminated, it facilitates the suspension of one's consciousness with the excuse that one is merely following orders. This is what the very young members of the 372nd military police battalion claimed; if it is true that they were simply following orders, then the root of the evil goes much deeper: it is tangled up in the policies of a presidential administration that sanctions torture, abuse and violence against people who are, in many cases, not charged with any crimes. This is what the films discussed in this paper reveal, this is the tainted legacy of the war on terror, a conflict whose final chapter – considering the bloody civil and religious war that is currently raging through Iraq, partly triggered by the withdrawal of American troops in 2008 – will probably not be written for a very long time.

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THE EUROPEAN UNION AND THE UNITED STATES' STRATEGIC APPROACHES ON THE UKRAINIAN CRISIS: A NEW CLEAVAGE IN THE TRANSATLANTIC RELATIONS?

Dr. Valentin Naumescu

Associate professor

Babeş-Bolyai University, Cluj-Napoca, Romania

vnaumescu@yahoo.com

Abstract: *The essential purpose of this article is to explore and compare the European Union and United States' different perspectives on political, military and economic crisis of the Eastern European periphery, after a series of key events in the region, such as the Vilnius Summit in November 2013, the Euro Maidan Revolution in January-February 2014, and especially the annexation of Crimea in March 2014, followed by secessionist movements in Eastern Ukraine. The idea of international sanctions against a more and more assertive and abusive Russia, though generally agreed by both the United States and the European Union, was accompanied by quite different tones and nuances of the top political discourse in relation to Moscow. Due to its strong economic ties and commercial interests related to Russian market and resources, the European Union's attitude, undoubtedly under the leading influence of Germany, was rather cautious, hesitating and moderate. On the contrary, the United States proposed a firmer response to the Russian aggression in Eastern Europe, reflected in an envisaged NATO pivot to the Eastern border of the Alliance. The finality of this inquiry is to evaluate whether different addresses regarding Ukrainian crisis, in Brussels and Washington, reflect or not a new episode of the post-2003 transatlantic cleavage.*

Keywords: The United States, NATO, the European Union, Eastern Neighbourhood, Russia, Ukraine

1. Introduction. Defining "Eastern Europe" according to International Politics and Ideology. Then and Now

The region of Europe located between Germany and Russia underwent a process of repeated renames after World War II. The sequence of labels assigned to this group of countries has had certain ideological and (generally speaking) negative connotations. In other words, Eastern Europe was always politically defined, mainly as a border region separating (or connecting?) the West and Russia.

Before 1989, “Eastern Europe” was the synthetic name given in the West to the group of communist countries²⁷ beyond the Iron Curtain, other than the Soviet Union which was considered distinctly. Altogether, the USSR and the Eastern Europe were forming the “socialist bloc”, rivalling with the Western bloc in the so-called Cold War.

According to Keith Crawford, “from the Western viewpoint there was little difference between the various countries of Soviet-dominated ‘Eastern Europe’: they were all part of what former US President Ronald Reagan once called the ‘evil empire’. [...] So once they were freed from the yoke of Soviet occupation, they sought to distance themselves quickly from the idea of ‘Eastern Europe’, with all its previous, mostly negative connotations” (Crawford 1996, pp. 1-2).

The historical events in 1989 created the premises for a new name that had to be assigned to the former “Eastern Europe”, once they succeeded to abolish communist regimes and took distance from the Soviet Union led by Gorbachev. The new concept of “East Central Europe” (ECE), assumed in Western Europe as well as in North-America, reflected both a desire to return to their Central European cultural identity but also to make clear that none of them is an appendix of the Soviet Empire, still existing at that time. The number of states increased from eight to thirteen: East Germany (GDR, which very soon disappeared after the German reunification in October 1990), Poland, the Czech and the Slovak Republics (after the split of Czechoslovakia, effective on January 1st, 1993), Hungary, Romania, Bulgaria, Albania and the six states emerged after the disintegration of Yugoslavia: Serbia, Croatia, Slovenia, Macedonia, Bosnia-Herzegovina and Montenegro.

The general claim of the former “Eastern European” countries to be considered part of the Central Europe (not of the Eastern Europe) had a number of historical, cultural and obviously political reasons. Milan Kundera, the famous Czech writer and dissident, explained them in an essay entitled “The Tragedy of Central Europe”, based on the idea that Central European countries were always closer culturally and spiritually to the West than to the East of the continent, but it was only the Iron Curtain and the Cold War that made them belonged to the “Eastern Europe”, against their popular will (Kundera 1984).

²⁷ East Germany (GDR), Czechoslovakia, Poland, Hungary, Romania, Bulgaria, Yugoslavia and Albania.

After the dissolution of the USSR in 1991 and the proclamation of independence of the former Soviet republics, ECE was also meant to distinguish the “intermediate group” of countries (with non-Soviet history) from the ex-Soviet states such as Belarus, Ukraine, Republic of Moldova, etc. ECE was thus not including the former Soviet territory.

Between 2004 and 2013, 11 countries²⁸ from East Central Europe joined the European Union and thus gained their full geopolitical place in Central Europe. 12 states (the already mentioned 11 plus Albania) became NATO members, with the essential approval of the United States. They are part now of the extended West. After 2009, once the program of Eastern Partnership was initiated, a new “Eastern Europe” has appeared: the Eastern Neighbourhood of the European Union, represented by six former Soviet republics: Belarus, Ukraine, Republic of Moldova, Georgia, Armenia and Azerbaijan. This is where our analysis starts from.

This is not just wordplay with the “West”, “Central” and “Eastern” Europe. It was actually a historical westernization of a long contested region of Europe located between Germany and Russia, entered in its second major phase: the absorption of the former republics of the Soviet Union in the Euro-Atlantic system. When the West first advanced to the East and extended NATO’s umbrella of security over 12 former communist countries (11 in the case of the EU), the former Soviet sphere of influence on the European continent has substantially shrunk. The sequence of several enlargements of NATO (1999, 2004 and 2008) and of the European Union (2004, 2007 and 2013) pushed the strategic, political, military and economic frontier of the West closer to the Russian territory but still kept a thin “buffer zone” between the two blocs. It is the one which President Putin doesn’t agree to become part of the Western system.

The European Union and the United States have today different views on how to deal with the Eastern European periphery. It is thus not surprising at all to hear the French Foreign Minister Laurent Fabius saying that “the EU is not yet prepared to integrate

²⁸ Poland, the Czech Republic, Hungary, the Slovak Republic, Lithuania, Latvia, Estonia, Slovenia, Romania, Bulgaria and Croatia.

Ukraine”²⁹ and the American officials speaking about a possible enlargement of NATO with Ukraine, Georgia and the Republic of Moldova.

2. The Eastern Partnership (EaP) and the West’s Proposal for the “New Eastern Europe”: Integration without Accession?

Launched in May 2009 at the Prague Summit,³⁰ the Eastern Partnership was meant to farther push the frontiers of the West to the East, through a quite ambiguous form of political and economic collaboration with six former Soviet republics, without any guarantee for future accession. President Putin saw this new step of westernization occurring in the redefined “Eastern Europe” as an “assault” against Russian strategic interests and decided to combat the process of rapprochement between these states and the European Union. The new EU attempt of pushing to the East, through the Eastern Partnership and the Association Agreements, faced this time the aggressive opposition of Moscow, especially in the case of Ukraine. The dramatic events in Kyiv in the winter of 2013-2014 were followed by the ousting of then-President Yanukovich and soon after by the severe military crisis of Crimea, in March 2014. It was the moment when we started speaking about the “second Cold War” (Naumescu 2014).

When the Eastern Partnership has been launched, in 2009, it was supposed to be another success story of the European Union. The finality was nevertheless ambiguous even in the most optimistic scenario. In official terms it is mentioned that “the initiative aims at tightening the relationship between the EU and the Eastern partners by deepening their political co-operation and economic integration. The EaP neither promises nor precludes the prospect of EU membership to the partner states” (EaP 2009). In simple

²⁹ *Le Nouvel Observateur*, L'UE n'est pas prête à intégrer l'Ukraine, répète Fabius, 7 June 2014, <http://tempsreel.nouvelobs.com/monde/20140607.AFP9130/l-ue-n-est-pas-prete-a-integrer-l-ukraine-repete-fabius.html>, accessed 8 June 2014.

³⁰ See Council of the European Union, “Joint Declaration of the Prague Eastern Partnership Summit”, 7 May 2009, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf, accessed March 2014.

words, that was an attempt of extending the European model of governance and the Western economic system over the six former USSR components, without giving them guarantees for future membership status. Nevertheless, this new possible wave of European integration faced the virulent opposition of Moscow. Despite high costs, limited capacities and lack of membership prospects, the EU Eastern Neighbourhood Policy continues to stir political and academic interest on the continent, while a change of approach is needed. More and more voices ask nowadays Brussels to review the Eastern Partnership and think to a European perspective for the EaP countries (Langbein and Borzel 2014).

What is essentially explaining the new tension between the West and the Russian Federation amid the recent efforts of Ukraine, Republic of Moldova and Georgia to head for the Euro-Atlantic structures is a crystal clear declaration of Russian President Vladimir Putin, dating from his first term. “Above all, we should acknowledge that the collapse of the Soviet Union was a major geopolitical disaster of the century. As for the Russian nation, it became a genuine drama” (Putin 2005) concluded the Russian leader in an official speech before the Parliament in May 2005, with regard to the historical end of the Cold War (I) and the disintegration of the communist super-power.

The enlargement of NATO and the EU towards Eastern Europe, including some former Soviet republics (Lithuania, Latvia and Estonia) as well as the subsequent tensions with an undaunted Russia, have been predicted long before the first waves of extension. In the mid ‘90s, when the US and Western allies were still hesitating regarding East enlargement, Zbigniew Brzezinski was anticipating: “some will say that the impotence to extend the Alliance could predict a Yalta II, that is a *de facto* recognition of a special sphere of influence of Russia on the territory of the former Soviet Union and Central Europe. [...] Although a Yalta II is impossible today, according to Russia’s state and new realities in Central Europe, only a clear manifestation of the US President will end the increasing temptation to treat in a populist form the relation with Russia and the future of Europe” (Brzezinski 1995, p. 317). The similarities with the current situation, almost 20 years after that sharp and realist analysis made by Brzezinski well before the Madrid NATO Summit of 1997, are shocking indeed. With the single difference that the West

frontiers have advanced meantime from the Berlin Wall to the so-called “Eastern Neighbourhood”, we can add. The former Eastern Europe is now part of the Central Europe while the new Eastern Europe is represented by the six former Soviet republics included in the Eastern partnership.

The tensions in the Eastern periphery of the European Union arose with the occasion of the Vilnius EU Summit in November 2013. With the end of its five year term approaching, the European Commission wanted to present a major success story and also to prove full potential of the European Union to work with the Eastern European countries. From the total of six member states of the Eastern Partnership³¹ (EaP), at least four were credited in the early phases with real chances to continue the political and institutional rapprochement with Brussels: Ukraine, Republic of Moldova, Georgia and Armenia. Belarus and Azerbaijan were accepted in the program in order to have a complete image of the region (from the North of the continent to South Caucasus) but there were no consistent hopes to see them soon as associated members of the Union.

Among the six EaP member states, three countries are affected by frozen conflicts (not to mention the Nagorno-Karabakh frozen conflict between Armenia and Azerbaijan) and have Russian troops on their territories: the Republic of Moldova (Transnistria), Georgia (Abkhazia and South Ossetia) and, more recently, Ukraine which saw Crimea annexed by Russia, despite the fact that the international community does not recognize the territorial loss suffered by Ukraine. “Nobody was able to remove Russia from this territory”, affirms the Romanian Presidential Adviser Iulian Chifu, “neither from Abkhazia, nor from South Ossetia or Transnistria. [...] All this ‘because we can’, ‘because you cannot make us leave’, or ‘because nobody could prevent us from staying there’” (Chifu 2014, p. 15). In other words, Moscow makes use of the *fait accompli* policy in the region.

The beginning of the fall of 2013 revealed a first unpleasant surprise for the Western leaders: Armenia unexpectedly chose to follow Moscow and enter the Customs

³¹ In fact, the program of Eastern Partnership numbers 34 states, given the fact that all 28 EU member states are part of it, but for the simplicity of the discussion we consider only the six non-EU countries.

Union with Russia, Belarus and Kazakhstan. “We have...held a detailed exchange of views on issues of Eurasian integration, and I confirmed Armenia's desire to join the Customs Union and to join in the formation of the Eurasian Economic Union” said the Armenian President Serzh Sargsyan, after a meeting with Russia’s Putin in September 2013 (The European Voice 2013). The short list of potentially pro-European Eastern countries has thus shrunk to three: *Republic of Moldova, Georgia and Ukraine*, less than three months before the Vilnius Summit.

The other two reluctant EaP member states, namely Belarus and Azerbaijan, went with Russia from the early phases of discussions. It was therefore no surprise to see Minsk and Baku (the northernmost and the southernmost capital cities of the EaP program) staying away from the perspective of initialling the Association Agreements (AAs) with the European Union. The former is an autocratic regime with a very strong pro-Russian orientation, while the latter used to be a pro-West (especially pro-US) country, recently disappointed by the lack of interest for its strategic potential showed by the United States. “In Azerbaijan you listen to their desire to be friends with the United States and bewilderment of American indifference. [...] They feel let down by the United States and they are” (Friedman 2013) noticed the American strategist George Friedman in his June 2013 Stratfor analysis.

The biggest drama at Vilnius was by far Ukraine, while the Republic of Moldova and Georgia were very firm and enthusiast in initialling their AAs. President Yanukovich of Ukraine seemed for a few months before the Vilnius Summit committed to go with the EU. A pro-European public campaign has been launched by the regime of Kyiv during the months of the 2013 summer and early fall. In fact, Ukraine was even more advanced than Georgia and the Republic of Moldova from this perspective, given the fact that Ukraine has initialled the AA in the past and it was in the process of signing the documents.

Starting with the fall of 2013 Russia began to put economic pressure on pro-European countries preparing to sign/initial the Association Agreements, especially on Ukraine and the Republic of Moldova (The Economist 2013). For instance, the Moldovan wines were banned on the Russian market (EU Observer 2013). Ukraine was notified over the 20 billion debts to Russian economy and banks, part of it owed to the giant Gazprom.

The winter was quickly approaching and, ironically or not, the Russian meteorologists were predicting the harshest winter in the past 100 years...

After a discrete Putin-Yanukovych meeting at a Moscow military airport in early November, the Ukrainian leader announced that he won't sign the Association Agreement with the European Union at Vilnius Summit and will turn politically and economically to Russia. The failure of making the deal with Ukraine stirred an angry riposte of some European media and analysts, considering the ineffectiveness of the German led EU strategy on Ukraine. Many voices blamed the rigid "Free Tymoshenko" clause imposed by Berlin to Yanukovych as an unrealistic and exaggerated one (the EU only dropped this condition during the days of the Summit) and also criticized the lack of a substantial financial support granted to Kyiv ahead of a difficult winter.

The Europeans were obviously dissatisfied with the Vilnius results. Criticism hit especially the negotiation strategy. "The inability of European bureaucrats to keep up with the Kremlin's manipulations – or Kiev's political calculations – has cost the EU a trade deal with Ukraine, and severely damaged its foreign policy. [...] The EU offered cooperation, free trade and financial contributions in exchange for democratic reforms. Officials in Brussels spoke enthusiastically about the emergence of an historic Eastern European policy not unlike former German Chancellor Willy Brandt's rapprochement with the Warsaw Pact countries in the 1970s. [...] The EU's other goal, even though it was not as openly expressed, was to limit Russia's influence and define how far Europe extends into the East. For Russia, the struggle to win over Ukraine is not only about maintaining its geopolitical influence, but about having control over a region that was the nucleus of the Russian empire a millennium ago. This helped create Cold War-style grappling between Moscow and Brussels" (Der Spiegel 2014) concluded the influential German publication in the aftermath of the devastating Kyiv announcement.

The episode of Vilnius ended thus with a demi-failure of the European Union and its Eastern Neighbourhood Policy. Only two out of six countries decided to get closer to Brussels. The biggest stake at Vilnius, as it was unanimously appreciated, namely Ukraine, was eventually among the reluctant European states. The failing Eastern Neighbourhood Policy, in the light of poor Vilnius Summit results, was extensively presented in a Report

of the French Senate's Commission for European Affairs, in December 2013, as a major malfunction of the relations between the European Union and the Russian Federation (The Senate of France 2013).

Looking back to the Vilnius Summit of November 2013, it is difficult to consider if a different negotiation strategy in relation to Yanukovych could have led to a positive decision. Probably not, I suppose. With or without the requirement of releasing Yulia Tymoshenko from prison, then-President Yanukovych would still not sign the Association Agreement. The main reason for not going with Brussels was probably the Kyiv regime's fear that Ukraine couldn't resist in the next months to Russian increasing economic pressures, amid its massive debt to Gazprom and Russian banks.

A few days after the Vilnius Summit, when President Putin publicly promised a bailout of 2 bn. Euro for Ukrainian economy and any hope for a European perspective seemed lost, virulent protests started in Kyiv's "EuroMaidan" and, soon after, in many Western Ukrainian cities. Angry people asked for Yanukovych's resignation, a return to the Constitution before 2004 and early presidential election. This is where a new and complicated chapter in Ukraine and Eastern Europe's history was just preparing to start.

3. The US and EU Relations with Russia: Cold War II or Business?

Ukraine seems today the corner stone of the revitalized Russian strategic thinking to recover influence over the geopolitical space of the former Soviet Union. Long before the Euro Maidan revolution, Zbigniew Brzezinski remarked: "Russia confronts with the Ukrainian problem, too. For Kremlin, keeping the option of a possible reabsorption of Ukraine represents a central strategic objective." (Brzezinski 1995, p. 312)

In only a few months, from October 2013 to February 2014, Ukraine switched dramatically back and forth, three times, from a neutral Eastern European country to a pro-EU declarative policy (early fall of 2013), then surprisingly to a Russian oriented regime (November 2013, ahead of the Vilnius Summit), then again to a pro-West attitude (late February 2014), after the ousting of President Yanukovych. Each of these three turning points left about half of the country dissatisfied, alternatively.

It is therefore not so difficult to understand that a country which can move so quickly from a political approach to the complete opposite one and then back (and so on) has at least two strong, dividing political options within its society. This symptom of a hesitating and divergent societal structure, balancing between East and West, has proved to be the most proper land for a “frontal collision” between Russia and the Euro-Atlantic system. We can agree that both political orientations in Ukraine have numerous supporters and, at the same time, each of them discontents large categories of people or entire regions. Both dimensions are substantial but none is sufficiently developed to make Ukraine an indistinctive part of Russia or Europe.

Essentially, it is almost a consensus to admit that the West of the country is pro-West and has a number of European cultural features, while the East is overwhelmingly pro-Russia. From language and religion (Greek Catholic in the West, Russian Orthodox in the East), architecture, culture and civilization style, to political options, everything seems to divide the two halves of the country, with Kyiv in the center as the main engine of the European option. Earlier in 2013, I have suggested that Ukraine as a whole seems stuck in-between two divergent systems, with not enough arguments and not enough sincere affinity either for Russia or for the Western culture, but rather a permanent borderline between the major blocs of interest (Naumescu 2014, pp. 324-27).

Eugene Chausovsky comes with an interesting connection between cultural and political cleavages of the Ukrainian society: “The east-west Ukrainian cultural divide is deep, and unsurprisingly it is reflected in the country's politics. Election results from the past 10 years show a clear dividing line between voting patterns in western and central Ukraine and those in the southern and eastern parts of the country. In the 2005 and 2010 presidential elections, Yanukovich received overwhelming support in the east and Crimea but only marginal support in the west. Ukraine does not have ‘swing states’.” (Chausovsky 2014). The Stratfor’s analyst goes further with his predictions: “Such internal political and cultural divisions would be difficult to overcome under normal circumstances, but Ukraine's geographic and geopolitical position magnifies them exponentially. [Ukraine is the quintessential borderland country](#), eternally trapped between Europe to the west and Russia to the east. Given its strategic location in the middle of the Eurasian heartland, the

country has constantly been – and will constantly be – an arena in which the West and Russia duel for influence”. The text from which these two citations are extracted was published only a few days before the referendum in Crimea.

On the 16th of March 2014, upon the decision of the local Parliament of Crimea, local authorities organized a referendum for seceding from Ukraine and joining the Russian Federation. Not at all surprisingly, the result has been an overwhelming 96.77% in favor of secession (independence), immediately followed by an application to join Russia³². Two days later, President Vladimir Putin signed the “treaty” of Crimea’s annexation. In fact, that was an incredibly fast operation of Russia, without any military resistance from Ukrainian troops. Less than four weeks after the fall of Yanukovych on February 22nd, Russia took control over Crimea, notwithstanding massive political and diplomatic protests and criticism from the United States, the European Union and almost all over the world.

Even the (usually) neutral China went on record as a supporter of Ukraine’s territorial integrity and in favor of respecting provisions of the international law: “China always respects all countries’ sovereignty, independence and territorial integrity. The Crimean issue should be resolved politically under a framework of law and order. All parties should exercise restraint and refrain from raising the tension.” (The Diplomat 2014). Nevertheless, in the eve of the Crimean referendum, Russia vetoed a resolution of the UN Security Council intending to declare the referendum unconstitutional, eventually supported by 13 member states out of 15. China has abstained.

Whether the European Union initial reaction to Crimea annexation has been rather timid, what about the economic, military and political levers of Russia in Ukraine and in the region? Andrew Wilson, an official from the European Council on Foreign Relations, reveals them, starting from the context of the Vilnius Summit and the EuroMaidan revolution in Kyiv: “Russia has been pressurizing all its neighbors since 2013 to dissuade them from closer relations with the EU. The threat of a new but anarchic democracy on

³² Details at The Voice of Russia, “Crimea applied to become part of Russia following referendum”, 17 March 2014, http://voiceofrussia.com/news/2014_03_17/Crimea-applied-to-become-part-of-Russia-following-referendum-2860/, consulted in March 2014.

Russia's doorstep will make things even harder for Moscow to accept. At the same time, Russia cannot rely on all of the levers of influence that worked under the old Yanukovych regime, but might use some new ones that have been taboo so far – such as threatening to provoke the split up of the country.” (Wilson 2014). Wilson mentions, among levers, the desperate need for economic assistance and the immense debt of Ukraine to Russian banks, gas dependency, and strategic industries such as aviation, shipbuilding, metallurgy or nuclear power, all of them dependent on Russian capital, resources or technology. Last but not least, compact Russian communities in Eastern industrialized cities like Donetsk, Kharkiv or Dnipropetrovsk represent a mass of political maneuver and structural vulnerability for the Ukrainian state. The episode of Crimea is more than relevant for the weakness of the Kyiv government in relation to the territories inhabited by large majorities of Russian ethnics. Although President Putin has announced he is not interested in annexing more territories, in Ukraine and in other countries in the region (Georgia, Moldova) persists the fear that the situation could repeat in Eastern Ukraine, Transnistria, Abkhazia or South Ossetia.

4. NATO's Pivot and Eastern Flank's Consolidation. Different Perspectives at Berlin and Washington?

The Crimean crisis has prompted a serious debate in the North-Atlantic Alliance with regard to Central and Eastern Europe's defense against revitalized Russian expansionist ambitions. The vulnerability of Central European member states of the Alliance as well as of the non-NATO but West-oriented countries in the Eastern Europe (Republic of Moldova, Ukraine, Georgia) is based not only on their smaller size in comparison to the Russian military might but also on the scarcity of NATO military facilities in Central Europe, at the Eastern border of the Alliance.

A Report of the Center for European Policy Analysis (CEPA) in March 2014 reveals this severe imbalance between the massive deployment of NATO troops and installations in Western Europe (a reminiscence of the first Cold War, 1949-1990) and Central Europe (Baltic republics, Poland, Slovakia, Romania, Bulgaria). “But NATO

behavior has also fueled CEE insecurity. Under the 1997 NATO-Russia Founding Act, which preceded the first round of eastern enlargement, Alliance members issued a joint declaration (the so-called “three Nos”) stating that they had ‘no intentions, no plans and no reason’ to place significant military assets, including especially tactical nuclear weapons, in CEE countries. While receiving the all-important Article 5 guarantee (the essence of the NATO commitment and a revolutionary improvement in security), the CEE member states have been given few physical embodiments of that guarantee. In short, their security rests more on trust than military muscle.” (Lucas and Mitchell 2014).

Basically, the NATO debate was triggered by the Russian annexation of Crimea and the lack of credible political and economic response from the European Union. The discussions over possible EU sanctions against Russia only led to visa ban regarding 33 second level Russian officials, which was considered almost ridiculous and completely ineffective. For many analysts, the weakness of the EU reaction was mainly based on the strong dependency of Europe on Russian gas. Moreover, the interests of some big German companies to keep their access and connections to Russian market and resources made Berlin’s voice quite timid during the crisis. The fact that Germany “pulled back” and became relative quiet after Crimea’s annexation by Russia is actually contradictory with initial German exigency in relation to Yanukovich and the regime’s brutal intervention in EuroMaidan. Their favorite former opposition leader, Vitali Klitschko withdrew from presidential race. When things went too far, Germany realized that a full-fledged Cold War II against Russia, accompanied by EU severe sanctions, will seriously damage its economic interests. The prudence of Berlin administration to go ahead with the idea of economic sanctions was visible for many European and North-American analysts. For Vlad Mixich, it seems that “Putin relies on its strongest allies within the most important EU member state: the giant German companies with which he makes businesses [...] For instance, the President of Rotschild Deutschland, Klaus Mangold, has recently affirmed that ‘sanctions are the wrong way’” (Mixich 2014). Mixich comes with details in his report regarding the magnitude of BASF, Wintershall, RWE, E.on, Metro, VW or Siemens investments and connections with the Russian market.

On the contrary, the US attitude and tone on Crimea's annexation and Russian intrusion in Eastern Ukraine's separatist movement was much more critical than the EU's one and it clearly stressed the necessity of international sanctions. There are at least three possible reasons for the American more vigorous reaction: the traditional Democrat-Republican rivalry which gave the conservative opposition the opportunity to criticize the weakness of Obama administration and thus to higher up the entire political stake of the issue, the US interests in leading NATO's restructuring and increasing military capabilities at Eastern European border of the Alliance, and the Washington's strategy to contain Russia, inspired by the Cold War I. The New York Times' columnist Peter Baker explains, in April 2014, the old and new US policy in the region: "Just as the United States resolved in the aftermath of World War II to counter the Soviet Union and its global ambitions, Mr. Obama is focused on isolating President Vladimir V. Putin's Russia by cutting off its economic and political ties to the outside world, limiting its expansionist ambitions in its own neighborhood and effectively making it a pariah state." (The New York Times 2014).

For Republicans this is not enough. The Senator of Arizona, former presidential candidate John McCain, leads the tough score of the "hawks" in clear and strong words: "The first, and most urgent, is crisis management. We need to work with our allies to shore up Ukraine, reassure shaken friends in Eastern Europe and the Baltic States, show Mr. Putin a strong, united front, and prevent the crisis from getting worse. This does not mean military action against Russia. But it should mean sanctioning Russian officials, isolating Russia internationally, and increasing NATO's military presence and exercises on its eastern frontier. It should mean boycotting the Group of 8 summit meeting in Sochi and convening the Group of 7 elsewhere. It should also mean making every effort to support and resupply Ukrainian patriots, both soldiers and civilians, who are standing their ground in government facilities across Crimea. They refuse to accept the dismemberment of their country. So should we" (McCain 2014). In fact, it is exactly the occult interference of the "other side" in the Ukrainian crisis which both the U.S. and Russian leaders are suspicioning: the one of the Western powers in EuroMaidan Revolution (as per Kremlin's view) and the one of Russia in the separatist movements from Eastern Ukraine, as retaliation.

The fall of the pro-Russian regime of President Yanukovich in Kyiv, after massive and violent protests, was perceived by Moscow as a West's obscure maneuver. "The Russians are convinced that the uprising in Kiev was fomented by Western intelligence services supporting nongovernmental organizations and that without this, the demonstrations would have died out and the government would have survived. [...] That means that they believe that Western intelligence has the ability to destabilize Ukraine and potentially other countries in the Russian sphere of influence, or even Russia itself. This makes the Russians wary of U.S. power" (Friedman 2014), explains George Friedman on Putin's aggressive riposte against Ukraine, immediately after the ousting of Yanukovich.

The intelligence service wars in Eastern Europe are definitely not a new story. It had however a long tradition in the Cold War (I) and it seems to be reinvented in the Cold War II, if they ever ceased. After the fall of the pro-Russian President Yanukovich, massive and persistent accusations came to blame the intrusion of the Russian "special forces under cover" (the now famous "green men") in pro-Russian separatist movements which erupted "all of a sudden" in Eastern and Southern Ukraine.

5. Conclusions. Putin Reinvents the West. But a New One

The quadripartite³³ Geneva Agreement of April 17, 2014, apparently neither resolves the crisis of Ukraine nor stops the Cold War II in Eastern Europe, between Russia and the West. Although the idea of disarming the illegal groups and vacating occupied buildings on the territory of Ukraine was fair and reasonable, just a few days later the first victims were announced in the separatist regions. It is a clear sign that the crisis is still far from its end (Reuters 2014).

The paradigm of a new Cold War, though officially rejected by both sides, has a number of robust arguments. The divergent and mutually criticizing political discourses of Western and Russian officials, the defiance of international law and prior arrangements

³³ Ukraine, Russia, the United States, the European Union.

(such as the Budapest Memorandum on Ukraine of 1994),³⁴ the idea of sanctions, threatens and isolation, the military maneuvers in the region (Russian as well as NATO troops), the intelligence services wars, the exclusion of Russia from G8 and return to the old G7, the reinvented ideological propaganda on certain media channels etc. are among the symbolic and combatant-like gestures that remind us of the tensions before 1989.

Alina Mungiu-Pippidi, Professor at Hertie School of Governance in Berlin, sees a preliminary connection of the current Cold War with the Russian-US dispute from the past years, with regard to the American anti-missile shield's deployment in Eastern Europe, and elaborates on this idea in the context: "See the Russians were right to oppose the American shield? But it's false: the Russians are not doing well in economy and it's not the best idea to defy now the whole world. So the Cold War is here. The more we impose sanctions, the more we have to negotiate with them" (Mungiu-Pippidi 2014).

The tragedy of Eastern Europe, in its old and new version, is represented mainly by the same paradoxical cleavage between high geopolitical significance and the economic weakness of the region. Whether the former "East Central Europe" has relatively got free from Russia's economic influence after joining the European Union in the 2000s (some EU member states still relying on Russian gas), the countries of the "Eastern Neighbourhood" depends on the Russian market to a large extent.

The substantial energetic dependence on Russian gas resources and, for most of them, on Russian imports and exports represent a major vulnerability for the countries aspiring to Western integration. The economic aid from West is slow and not enough. There are no immediate solutions for the huge debts of Ukraine to Russian economy or for the Moldovan fragility in relation to losing access on the immense market in the East. None of these countries are competitive enough to simply switch from Russian market to the EU market.

³⁴ The US, UK, Russia and Ukraine signed a Memorandum to guarantee Ukraine's sovereignty and territorial integrity in exchange for Ukraine's renouncement of holding nuclear arms, inherited from the Soviet Union epoch. For details, see Terry Atlas, "Ukraine Gave Up Nuclear Arms in 1994 Deal Russia Flouts", *Bloomberg*, 5 March 2014, <http://www.bloomberg.com/news/2014-03-05/ukraine-gave-up-nuclear-arms-in-1994-deal-russia-flouts.html>.

As for the US administration, the focus is on political, military and strategic security issues rather than economic concerns. Steven Pifer explains the American response on Ukraine-Russia crisis: “The U.S. government’s response has been organized along three vectors: (1) bolster the Ukrainian government; (2) reassure NATO allies unnerved by Moscow’s aggressive behavior; and (3) penalize Russia with the objective of promoting a change in Russian policy. [...] Washington should encourage Kyiv to pull together the strands of a package to stabilize its internal situation, including elements of interest to many in eastern Ukraine” (Pifer 2014). Among these elements, Pifer mentions de-escalation of fighting in eastern Ukraine, decentralization of political authority, early Rada elections, Russian language status and international support for Ukraine. Nevertheless “deepening relations with NATO would antagonize Moscow, and there is no appetite in the Alliance to accept Ukraine as a member or offer a membership action plan” concludes the Director of Arms Control and Non-Proliferative Initiative of the United States on June 5th, 2014.

The US and the EU approach the Ukrainian crisis in basically the same sort of political understanding, but in different keys of addressing the Moscow’s recently reiterated ambitions. Economic contexts are significantly different in North America and Europe, especially when it comes to dependence on Russia. First of all, from the other side of the Atlantic, the Americans do not rely on Russian gas resources or generous emergent market, and see the assertive Russia as a threat to the strategic arrangement in Eastern Europe. Secondly, the United States saw in this crisis a good opportunity to return to Central and Eastern Europe in a better position and to ‘reinvent’ NATO. Western Europeans are caught ‘prisoners’ between hard line principles and massive commercial interests in relation to Russia. To give just an example, France decided to continue the contract with the Russian army and deliver the two Mistral warships, despite American and Polish disagreement and the suspicion that the new vessels with NATO technology will strengthen the Russian fleet in the Black Sea. As for the Germans, it was clear from the beginning that economic sanctions against Russia are potentially damaging their economic interests, and therefore chancellor Merkel opted for mild (almost negligible) sanctions. Altogether, the transatlantic relation does not see its current benchmarks deteriorating

during the Ukrainian crisis, chiefly because of more interest for NATO in Europe, but once again the American and European perspectives are perceived different, if not divergent.

The Cold War II reveals the strategic potential and geopolitical attractiveness of the Eastern European periphery as well as its fragility, limits and vulnerabilities. The West would definitely like to see these countries turning their back upon Russia but, at the same time, neither the European Union nor the United States are prepared to help them consistently. Russia started a restructuring of the balance of power in the region, in order to restore its strategic influence, at least in the former perimeter of the defunct Soviet Union. At the end of the day, this tension will end with a new balance of power in the region. We don't know yet if Putin's attempt to higher up the international profile of his country by "defending traditional Russian interests in the region" (as Foreign Minister Lavrov uses to explain) and keeping the West away from the former USSR's frontiers will be successful or not. What we know for sure is the fact that, maybe for the first time in their history, countries like Ukraine, the Republic of Moldova or Georgia could have a real opportunity to decide on what direction they would like to go, even (for one reason or another) this decision might be way more difficult than they expected a few years ago, when the Eastern Partnership was enthusiastically launched.

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BRIDGING THE TRANSATLANTIC PRIVACY DIVIDE

Titus Poenaru

PhD student

Babeş-Bolyai University, Cluj-Napoca, Romania

titus.poenaru@gmail.com

Abstract: *The advent of modern telecommunication technologies and in particular the internet created major challenges in many fields of law, due to the conflict between the territorial application of legal rules and the borderless nature of the internet. Among them, the issue of privacy / personal data protection has risen to the top of the agenda, in particular following the revelations regarding the mass surveillance activities carried out by the National Security Agency in the US and other intelligence services around the world. This paper gives an overview of the main differences in the approach to privacy protection in the EU and the US (general regulatory approach, human rights vs economic perspective, extraterritoriality, flexibility of data protection frameworks) and looks at the ongoing processes of reform on both sides of the Atlantic and at the forums for negotiations with a view to addressing these gaps (EU-US agreements, multilateral context). Negotiations at executive level are important, but contacts must take place also at the level of elected politicians, including in Congress and the European Parliament. The paper concludes that at least in the short term, it will be difficult to achieve agreement and that companies will be the ones taking the burden. In a medium term perspective, however, the need for greater convergence and mutual recognition will make compromises and innovative solutions necessary.*

Keywords: privacy, personal data protection, transatlantic relations, mass surveillance

1. Introduction

Conceived and implemented by revolutionary IT engineers, the internet was meant to create a “cyberspace” without borders, where people could be free of major interference from state authorities. At least that was the indication in the 1996 “Declaration of the Independence of Cyberspace”: “Governments [...] on behalf of the future, I ask you of the past to leave us alone [...] You have no sovereignty where we gather [...] I declare the global social space we are building to be naturally independent of the tyrannies you seek to

impose on us.”³⁵ And, at the beginning, it seemed that one could remain anonymous on the internet, as captured by the famous adage “On the Internet, nobody knows you're a dog.”³⁶ However, it was not a coincidence that the beginnings were financed in major part by the US defence budget (Bolt, Beranek & Newman Inc, 1981). With time, the real life thieves moved into the cyberspace to become “hackers”; terrorists and governments launched cyberattacks posing threats to critical infrastructures; governments censored information or created national firewalls, while companies (Apple, AOL, Facebook) build walls (The Economist, 2010), while intelligence services did not lose the opportunity to harvest and filter through the vast amount of bytes circulating through cables all around the world for threats and presumably other national or economic or political interests.

The surveillance issue exploded in media after the NSA contractant Edward Snowden gathered of secret reports and documents and made them available to the world through key journalists, which subsequently released them bit by bit at certain well planned moments. It became a major sticking point in EU-US relations, firstly only at the level of the Commission and the Parliament, but soon to cover Germany, particularly after the news about the German Chancellor's phone interception (published just the week before a visit of a European Parliament delegation to Washington). This was to be one of the main points of the EU-US Summit in March, until Putin decided to invade Crimea and, by doing this, reminded of the importance of the shared transatlantic values of the role of the US in protecting Europe's security.

Nevertheless, the issue will not go away. On the contrary, privacy in the context on the internet and the tension between privacy and security are defining fundamental rights issues of our time and will continue to be debated, separately, but also jointly, on both sides of the Atlantic and in general in the "free world".

There is a value-based and legal-based divide between the US and EU approach to “privacy”, which has only been made more acute by the pervasiveness and borderless

³⁵ http://en.wikipedia.org/wiki/A_Declaration_of_the_Independence_of_Cyberspace, last accessed on 1.06.2014.

³⁶ http://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you%27re_a_dog, last accessed on 1.06.2014.

internet communications. Data originating from an EU country and reaching another EU country could easily travel through cables or be hosted on servers based outside the EU and therefore the territoriality of laws no longer matches real life.

This article looks at the key issues that divide the EU and the US on privacy matters, the current formal *loci* where these issues are being discussed and the prospects of reaching agreement (or at least making significant progress) in these major files, as well as presenting considerations on what the EU could do to increase its standing.

2. The different approaches to personal data protection/privacy

Some preliminary remarks are necessary. As this is not a legal comparative paper, we will not go into the details of terminology (we take that “privacy” in US is equivalent to “data protection” in Europe (Marcinkowski, 2013, p. 1172), the definitions used on the two sides of the Atlantic, nor the detailed status (autonomous right or not) of personal data in the context of the “private correspondence” (Ungureanu, 2014). What is important will be the focus on the policy approaches taken and the resulting level of protection for the citizens.

2.1 General approach to data protection regulation

In the US, the protection of privacy on the internet is fragmented and ad-hoc (Shaffer 2000). It is probably the only OECD member without a horizontal privacy regime (Rossi 2014). This is not only due to the Common Law system (the federal “Privacy Act” from 1974 is a fundamental reference point, but covers only part of the public sector), but it is as such also by design. The White House “Framework for Global Electronic Commerce” of 1997 notes that, by its nature, the internet “can, if not managed carefully, diminish personal privacy” and therefore it is “essential to ensure personal privacy in the network environment, if people are to feel comfortable doing business”. The approach taken is that “the Administration supports private sector efforts now underway to implement meaningful, consumer-friendly, self-regulatory privacy regimes. These include

mechanisms for facilitating awareness and the exercise of choice online, evaluating private-sector adoption of and adherence to fair information practices and dispute resolution.”³⁷

On the other hand, the EU has a fundamental piece of legislation which covers data protection in a horizontal manner – the 1995 Data Protection Directive³⁸ (completed with other pieces of legislation such as e-privacy directive³⁹ and framework decision on data protection on law enforcement⁴⁰). What is more important, however, is the ongoing review of the Data protection legislative framework, which is in the middle of the ordinary legislative procedure. In January 2012, the European Commission proposed a package consisting of a comprehensive regulation⁴¹ (“General Data Protection Regulation”) and of a directive, covering the law-enforcement sector⁴² (so-called “Police directive”). The European Parliament voted its 1st reading position in March 2014⁴³ and the file is a priority for both the Greek and Italian Council Presidencies (in 2014), while the European Council

³⁷ <http://clinton4.nara.gov/WH/New/Commerce/read.html>, accessed on 01.06.2014.

³⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995 P. 0031 – 0050.

³⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201 of 31.07.2002.

⁴⁰ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30/12/2008, p. 60–71.

⁴¹ http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, accessed on 01.06.2014.

⁴² http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_10_en.pdf, accessed on 01.06.2014.

⁴³ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0212>, accessed on 01.06.2014.

conclusions of 25 October 2013 call for a timely adoption of the data protection framework, in order to achieve a digital single market by 2015.⁴⁴

While the directive was provided a clear basis for a harmonised approach in Europe - in practice, through different transposition laws at national level and the diverse application of these laws by Data protection authorities, the level and standard of protection was much less harmonised. An example is the Irish data protection authority (DPA), which is more lenient and understaffed, certainly an argument for companies such as Facebook to establish its European Headquarters there. According to the directive, the legal interpretations the Irish DPA are applicable throughout Europe for companies establishing themselves in Ireland (Rossi, 2014, p. 74). That is one of the issues the reform is trying to address – making the data protection in Europe even more coherent - with a regulation directly applicable in Member States and a stronger coordination of data protection authorities at national level.

However, the different approaches are not the major sticking points. What matters is the content of the rights and the way they are applied, so as to afford adequate protection of privacy of citizens.

2.2 Consumer approach vs. human rights approach

While the difference in the “patchwork” and “horizontal” approach can be also justified by the different legal and societal traditions (common law / civil law, self-regulation / public law), there is a major difference in terms of philosophy.

In Europe, personal data protection stems as a fundamental right, being linked to terms such as “dignity”, “respect”, “honour”, “inalienable rights” and therefore (due to historical reasons), it is connected with fundamental values layer (such as dignity and freedom). It is included in the European Convention of Human Rights (article 8), in the Treaty on the Functioning of the EU (article 16) and in the relatively detailed three paragraph article 8 of the EU Charter of Fundamental rights:

⁴⁴ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf, accessed on 01.06.2014.

- “1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.”

Data protection is not an absolute right, but should be considered in relation to its function in society, and in balance with other rights (such freedom to conduct a business). The ECJ confirmed this approach in 2010⁴⁵ also on the basis of Article 52 of the Charter (“limitations may be imposed on the exercise of the right to data protection as long as the limitations are provided for by law, respect the essence of the right and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others”).

This balance of rights also exists in the US system, but seems to be tilted towards the freedom to conduct a business and the individual as a responsible consumer. The 1997 White House “Framework for Global Electronic Commerce” underlines that “Americans treasure privacy, linking it to our concept of personal freedom and well-being” and that people need to feel comfortable if their privacy is protected in order to do business. The frequent use of the word “fair” to refer to privacy protection principles is also relevant. The approach is maintained in the 2012 White House “Consumer privacy bill of rights”: “This framework rests on fundamental privacy values, flexible and adaptable common law protections and consumer protection statutes, Federal Trade Commission (FTC) enforcement and policy development that involves a broad array of stakeholders”. The paper considers that this framework is “strong”, but two elements are lacking and it is trying to address “a clear statement of basic privacy principles that apply to the commercial world, and a sustained commitment of all stakeholders to address consumer data privacy

⁴⁵ Court of Justice of the EU, judgment of 9.11.2010, Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert [2010] ECR I-0000.

issues as they arise from advances in technologies and business models.”⁴⁶ This approach means that there is a strong emphasis on the commercial value of personal data, seen as a commodity which may be subject to business transactions. In the US, a Google search for a persons' name will reveal an array of websites⁴⁷ that collect information about a person from all “public” resources available (through deep search of databases) and provide, at a cost, additional personal details – contact details, work and relations history, family history, records of civil and criminal proceedings, etc. Indeed, while privacy rules are included in laws, in contractual agreements and there are various causes for action under common law, there is no general prohibition on private companies acquiring, communicating or otherwise learning private information (Swift 2013, p. 76). As we will see below, such a situation might not be possible in the EU, in particular following the Google judgement of the European Court of Justice, on May 13, 2014.⁴⁸

2.3. Discrimination of EU citizens in terms of law enforcement and intelligence operations

If in the commercial area, the right to privacy has to be balanced against the freedom to conduct a business, in what concerns the relationship with the state authorities, there is a need to balance it with security and law-enforcement objectives. That qualification is covered by the use of the terms “arbitrary” infringements of privacy in the UN Declaration on Human Rights, “arbitrary or unlawful interference” with anyone’s privacy or correspondence (UN International Covenant on Civil and Political rights - ICCPR) and “unreasonable” search and seizure by the Fourth Amendment to the US Constitution.

⁴⁶ <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>, last accessed on 1.06.2014.

⁴⁷ See for example <http://www.zdnet.com/blog/violetblue/how-to-remove-yourself-from-people-search-websites/612> or <http://www.confidentbrand.com/guides/what-to-do-when-your-personal-information-becomes-publicly-available-online>.

⁴⁸ Court of Justice of the EU judgment of 13.05.2014, Case C-131/12, Google Inc. v Agencia Española de Protección de Datos, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131>, accessed on 01.06.2014.

In the US, but also in Europe, this balance has tilted strongly in the favour of security after the 9/11 terrorist attacks. The USA Patriot act and the several amendments Foreign Intelligence Surveillance Act have given many more powers to the US authorities to intercept private communications. The extent of these came to light following the publication of NSA documents collected by Edward Snowden.⁴⁹ While the issue is extremely important in itself and there is a vivid worldwide debate on the subject, what is relevant for our paper, from the point of view of EU-US relations, is the discriminatory treatment of EU citizens.

For example, EU citizens not residing in the US are not covered by the Fourth Amendment. That is established by the Supreme Court⁵⁰ and was clear from the statements of President Obama, who argued for the importance of the surveillance programmes, noting that the PRISM programme “*does not apply to US citizens and it does not apply to people in the United States.*”⁵¹ This leads us to a major difference between EU and US approaches. The US legal system does not protect “non-American citizens or residents” as data subjects and almost any foreigner can be identified as a target for surveillance purposes (Bowden 2013, pp. 19-21). According to the US legal framework the provisions of the First and Fourth Amendment do not protect EU citizens and it seems that relevance requirements are very low in case of US surveillance activity directed at EU citizens. For instance, under section 702 of the FISA Amendments Act, no “probable cause”⁵² is required in order to target foreign citizens, as targeting and minimisation guidelines do not

⁴⁹ An account of the various programmes and their reach is included in the Working Document of the European Parliament Civil Liberties committee, accessible at <http://www.europarl.europa.eu/document/activities/cont/201403/20140306ATT80616/20140306ATT80616EN.pdf>, last accessed on 01.06.2014.

⁵⁰ "According to the US Supreme Court, foreigners who are not residing permanently in the US can only rely on the Fourth Amendment if they are part of the US national community or have otherwise developed sufficient connection with the US to be considered part of that community: *US v. Verdugo-Urquidez* – 494 U.S. 259 (1990), pp. 494 U.S. 264-266.

⁵¹ www.whitehouse.gov/the-press-office/2013/06/07/statement-president, last accessed on 01.06.2014.

⁵² <http://ec.europa.eu/justice/data-protection/files/report-findings-of-the-ad-hoc-eu-us-working-group-on-data-protection.pdf>, last accessed on 01.06.2014.

apply in the case of non-US persons. The Foreign Intelligence Surveillance Court may issue warrants to obtain information related to the communications of a particular individual and authorised the use of the PRISM programme revealed by Snowden. European citizens have no right to be informed, nor can they challenge the surveillance activities conducted by US authorities in any way. Information related to EU citizens is included in the wide definition of “foreign intelligence information” in the Foreign Intelligence and Security Act (Bowden 2013, pp. 19-21). US companies, or EU companies with a US presence, will find it difficult to comply with US requests for such data as the Patriot act tends to require sharing of personal data in cases where the EU Directive would almost certainly prohibit it (Swift 2013), putting them in the middle of a conflict of laws.

So, whereas US legal protection concerning communication data applies only to US citizens and residents, in the EU, regardless of their nationality, everyone’s personal data and the confidentiality of their communications are protected as fundamental rights. Reciprocity is a crucial element of international relations and something that has been lacking in the EU-US relationship in this case.

On the other hand, the EU treaty explicitly excludes “national security” from the EU competences. This is also an exception used in other EU-US information sharing agreements. In addition, Member States’ intelligence services frequently share information with US ones and have their own programs, which might not be fully in line with data protection aspects. For these reasons, it is not for the EU to deal with this issue directly and, in this paper, we will refer to the other mechanisms used by the Commission to improve the legal status of EU citizens.

2.4 Extraterritoriality

With data flowing across borders and companies having presence and offering services throughout the world, the principle of the territorial application of laws is no longer so easy to apply. Both the EU and the US claim that the other’s legislative provisions – on data protection or on law enforcement / national security are extraterritorial in nature.

In 2012, before the Commission adopted its proposal on the Data Protection Regulation, in an unusual move, the US has commented on a draft version (Kerry 2014). According to Euractiv, citing an EU diplomat, “What has been unusual in this process was that a third country took a particular interest in the reform proposals from very early draft stages on, and received briefing materials from the US government.”⁵³ The informal paper attributed to the US Department of Commerce, considered that the regulation would have extra-territorial jurisdiction and negative impact on police and security cooperation (Informal US Paper). The paper refers to an article 42 of the “draft regulation” (which did not appear in the official Commission proposal) which would require the agreement of an EU Member State authority for the transmission of personal data held by a company to a foreign authority, even in based on a court order. The paper considered this provision as being “inconsistent with traditional practices of reciprocity” and would place companies in the middle of an irreconcilable conflict of laws. According to the regulation, a company offering services to EU citizens and processing their data, even if established abroad would come under the EU data protection rules. This is in line with the human rights approach of EU on this issue.

In a recent landmark decision on the “Google judgement” mentioned above, the European Court of Justice considered that already the 1995 Directive was applicable to Google, even if its processing activities and servers were located outside Spain (in the US). The national court suggested three grounds on which this might be the case: the ‘establishment’ in the territory; the ‘use of equipment’ in the territory (as regards crawlers or robots, the possible storage of data and the use of domain names); or the default application of the EU Charter of Fundamental Rights. The European Court found that Google Spain was ‘established’ in the territory, and, therefore, the data protection directive applied. It was not necessary to rule on the other possibilities as regards the scope of the Directive, which are very significant in the context of the Internet, so those issues remain open. The CJEU said that it was sufficient that the company carried out *advertising*

⁵³ <http://www.euractiv.com/specialreport-data-protection/us-lobbying-waters-eu-data-prote-news-510991>, last accessed on 01.06.2014.

activities and therefore part of its economic activities, these being linked to the well-known business model of Google.

It is ironic that the US government is criticising the extra-territorial application of EU laws, as it is something it has done itself in particular for law enforcement and national security purposes for many years. Basically, all businesses that have an even mere presence on US territory can be required to provide personal data to US law enforcement authorities, even if that data is stored in the EU.

For data stored in the US, the SWIFT case provides an excellent example. In 2001-2006, the US authorities issued 64 subpoenas,⁵⁴ obliging the Society for Worldwide Interbank Financial Telecommunication (SWIFT) to provide data for terrorism investigations. SWIFT, as it had servers in the US (used as back-up from EU servers), had to provide such information, but it did not inform EU governments and Member Institutions. This situation was in the end regulated through the TFTP agreement between the US and the EU, but the US authorities approach certainly did not pay attention to concerns related to extraterritoriality and reciprocity.

While there may be some legal arguments for access to data stored in the US, they are even weaker when data is located in the EU. Nevertheless, on 25 April 2014, a New York judge has ruled that US cloud providers must turn over data they have, regardless of where in the world it is stored. The judgment from magistrate judge James Francis in New York⁵⁵ came in response to a challenge from Microsoft that it should not have to hand data over regarding an Irish customer, as the information is stored overseas. Microsoft deputy general counsel David Howard argued: “The US government doesn’t have the power to search a home in another country, nor should it have the power to search the content of email stored overseas.” However, Judge Francis disagreed in his ruling, claiming that “the burden on the government would be substantial, and law enforcement efforts would be seriously impeded” if warrants for data did not cover this information. “Even when applied to information that is stored in servers abroad, an SCA [Stored Communications Act]

⁵⁴ Opinion 10/2006 of the Article 29 Working Party, p. 8, accessible at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp128_en.pdf, last accessed on 01.06.2014.

⁵⁵ <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=398>, last accessed on 01.06.2014.

warrant does not violate the presumption against extraterritorial application of American law,” he added. While the judgment is likely to be appealed, it is still significant for the approach of the US government and will need to be followed. Microsoft lawyer noted that: “This is the first step toward getting this issue in front of courts that have the authority to correct the government’s longstanding views on the application of search warrants to content stored digitally outside the US.”⁵⁶

As former privacy chief of Microsoft, Caspar Bowden, put it, “It is starkly contemptuous of the Mutual Legal Assistance treaties between countries, giving a licence to ignore assurances of due process made to foreign countries, merely because a [treaty] might be onerous or time-consuming or rejected on grounds foreseen and agreed with that foreign country, such as political offences (or criminalised copyright).”⁵⁷

In addition, as described above, the Foreign Intelligence Security Act provisions also empower special US “secret” courts to issue warrants to private companies to deliver personal data, under severe penalties. It is for that reason that in its first reading position on the Data Protection Regulation,⁵⁸ the European Parliament has introduced a so-called “anti-FISA” clause. The new article would subject any judgment of a third country court or tribunal or any decision of any administrative authority in a third country which required the transfer of personal data to that third country to be approved by an EU data protection authority, where there is no mutual assistance treaty or international agreement in force between the requesting third country and the Union or a Member State. This would put companies in a conflict of law situation where they might have to choose between complying with the law of either the EU or the US. By suggesting an increase in the financial penalties for non-compliance with the Regulation, the European Parliament has also tried to improve the EU’s bargaining position. US companies will lobby the US

⁵⁶http://blogs.technet.com/b/microsoft_on_the_issues/archive/2014/04/25/one-step-on-the-path-to-challenging-search-warrant-jurisdiction.aspx, last accessed on 01.06.2014.

⁵⁷ <http://www.theguardian.com/technology/2014/apr/29/us-court-microsoft-personal-data-emails-irish-server>, last accessed on 01.06.2014.

⁵⁸<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0212&language=EN&ring=A7-2013-0402>, last accessed on 01.06.2014.

authorities for a change in the law, or face large fines this side of the Atlantic (up to 5% of the annual turnover).

There is one more important aspect to be mentioned in this context: the April 2014 judgment of the European Court of Justice annulled the data retention directive as it did not comply with personal data protection.⁵⁹ This Directive obliged Member States to adopt provisions ensuring the retention of certain data by electronic communications providers in order to have it available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism. Thus, the directive provided that the abovementioned providers must retain traffic and location data as well as related data necessary to identify the subscriber or user. However, it did not permit the retention of the content of the communication or of information consulted. There are several grounds on which the directive was annulled, but one is relevant to the extra-territoriality issue: “directive does not require **the data in question to be retained within the European Union**, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security [...] is fully ensured. **Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data.**” Here the court is clearly underlining the importance of EU authorities having control of the citizens’ data by ensuring they are located within the Union, therefore squarely under EU law.

2.5 Interoperability

In a paper commenting on the draft regulation, the US authorities underline the shared efforts to “advance the common goal of protecting individual privacy in ways that also enable innovation and economic growth, promote interoperability across national

⁵⁹ Court of Justice of the EU judgment of 8.04.2014, Joined Cases C- 293/12 and C- 594/12, Digital Rights Ireland and Seitlinger and Others, accessible at <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0293>, accessed on 01.06.2014.

borders” (Informal US Paper, p. 1). In fact, the view of the US is that the EU approach is too strict.

In particular, it makes reference to the requirement of “explicit consent” for the processing of one’s personal data. More recently, two other US documents make important references to the EU framework - the so-called Podesta Report⁶⁰ and the PCAST report.⁶¹ The first also strongly questions whether approaches based on information and consent of data subjects are still adapted to the “big data” era, compared to alternative approaches which would rely, to a greater extent, on context of data collection and use (Podesta, 2014, pp. 54-56).

The authors of the PCAST Report appear even more critical of what they consider to be an outdated approach to privacy both in terms of business opportunities and of consumers’ protection. They argue, for example, that “policies focused on the regulation of data collection, storage, retention, a priori limitations on applications, and analysis (absent identifiable actual uses of the data or products of analysis) are unlikely to yield effective strategies for improving privacy. Such policies would be unlikely to be scalable over time, or to be enforceable by other than severe and economically damaging measures” (PCAST, 2014, p. xiii). PCAST is also “not aware of more effective innovation or strategies being developed abroad; rather, some countries seem inclined to pursue what PCAST believes to be blind alleys. This circumstance offers an opportunity for U.S. technical leadership in privacy in the international arena, an opportunity that should be taken” (PCAST, 2014, p. xiv).

Many aspects of the informal US paper on the draft Data protection regulation have also been the subject of intense debates in the internal EU context and the outcome might be different than the draft Commission proposal. On the other hand, there is an aspect criticised by it, which has been recently strengthened by the ECJ in the Google judgement – the “right to be forgotten”. While the US considers that there is no such “internationally

⁶⁰ http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf, last accessed on 01.06.2014.

⁶¹ http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf, last accessed on 01.06.2014.

recognised human right to be forgotten”, it cannot be applied due to the “technical limitations of the internet” and “raises concerns regarding freedom of expression” (Informal US Paper, pp. 7-8).

However, the Court of Justice took another view, already on the basis of the 1995 Directive. Without naming it as such, it recognises the “right to be forgotten”. This decision strengthens the arguments of the proposed regulation, but, on the other hand offers the opportunity for legislators to clarify this judgement in the context of the interinstitutional negotiations.

The Court considers that personal data can only be retained for limited periods, for as long as it is relevant, amounts to a form of ‘right to be forgotten’. The Court considers that there has to be a balancing of rights between personal data protection and the right of the public to be informed, particularly when the information is about a public figure. But in light of the ease of obtaining information on data subjects, and the ‘ubiquitous’ nature of the ‘detailed profile’ that results from search engine results, the huge impact on the right to privacy ‘cannot be justified by merely the economic interest’ of the search engine operator. The public interest in the information was only relevant where the data subject played a role in public life. In light of the greater impact of search engine results on the right to privacy, search engines are subject to a stricter application of the balancing test. While the information might remain on the original (journalistic) website, it should be blocked from the search engine results. The CJEU states that search engines cannot rely on the ‘journalistic’ exception from the Directive. To comply with the judgement, Google has already provided a specific request form⁶² in the application of the right to be forgotten. However, it is not clear whether only the results from the national Google website will be removed or those from all Google websites in the world and this problem is linked to the “technical limitations of the internet”.

⁶² https://support.google.com/legal/contact/lr_eudpa?product=websearch, last accessed on 01.06.2014.

2.6 Transfers of data & adequacy

The concrete result of all the differences mentioned above is the obstacles they pose to transfers of personal data across the Atlantic, both for business and for law-enforcement purposes. If the standards differ, then there is no mutual recognition and EU companies face difficulties in transferring data in the US for processing.

The negotiations on mutual recognition/adequacy were already difficult in the aftermath of the adoption of the 1995 directive. An agreement was in the end concluded, and the Commission adopted an adequacy decision which entered into force in 2000, entitled “Safe Harbour”, which allowed data to be transferred to the US to certain businesses that registered with the US Department of Commerce and fulfilled several requirements.

The functioning of this system has been criticised throughout the years, for example through the Galexia reports, which found many loopholes.⁶³ In November 2013, the European Commission, which is legally in charge of such adequacy decisions, reviewed Safe Harbour and issued 13 recommendations which would have to be implemented by the US side by summer 2014. If those recommendations are not fulfilled, then the Commission could indeed suspend the decision,⁶⁴ with important consequences for many businesses. Meanwhile, the European Parliament has asked in March 2014 for a suspension of the decision.⁶⁵

3. Perspectives for bridging the gap between the two approaches

While the differences are both numerous and important, it is in the interest of both the EU and the US to work together and find a common ground. There are several ongoing

⁶³http://www.galexia.com/public/research/assets/safe_harbor_fact_or_fiction_2008/safe_harbor_fact_or_fiction.pdf.

⁶⁴ http://ec.europa.eu/justice/data-protection/files/com_2013_847_en.pdf.

⁶⁵ <http://www.europarl.europa.eu/news/en/news-room/content/20140307IPR38203/html/US-NSA-stop-mass-surveillance-now-or-face-consequences-MEPs-say>.

processes where this search for common ground is taking place and they will be explored in this section: internal reform processes in the EU and US, the discussions on Safe Harbour, the negotiation of a framework agreement allowing transfers of personal data for law enforcement purposes and multilateral organisations (OECD, Council of Europe).

There is one important process where data protection is NOT discussed, or at least not yet. This is the Transatlantic Trade and Investment Partnership negotiations. Privacy issues have been cut-out of the negotiations, following a political decision.⁶⁶ However, it appears that the US would like to discuss “data flows”⁶⁷ in the ecommerce chapter,⁶⁸ which implies a discussion on privacy rules and their mutual recognition. In addition, the European Parliament has adopted a resolution⁶⁹ which says that without a deal on the framework agreement for data transfer for law enforcement purposes, it would not consent to the TTIP. Therefore, this is a process that will need to be followed.

3.1 Internal reforms process in the European Union

For the moment, the proposed Regulation is strengthening the data protection framework, in order to ensure consistency of application across the EU, to clarify the territorial scope so that it includes companies located abroad, but offering services within the EU, to have clearer and stricter conditions for international transfers and stronger enforcement, the right to be forgotten, the necessity of “explicit consent” of the data subject etc. These aspects have been supported by the 1st reading position of the European Parliament, which was adopted by a virtual unanimity (95% of votes) in March 2014 (a

⁶⁶ <http://www.euractiv.com/specialreport-eu-us-trade-talks/ttip-data-elephant-room-news-530654>, last accessed on 01.06.2014.

⁶⁷ Stepping up a Gear: Press Statement by EU Trade Commissioner Karel De Gucht following the Stocktaking. Meeting with USTR Michael Froman on the Transatlantic Trade and Investment Partnership (TTIP).” European Commission, 18 February 2014, accessible at http://europa.eu/rapid/press-release_STATEMENT-14-12_en.htm.

⁶⁸ <http://edri.org/us-wants-to-undermine-privacy-in-ttip-negotiations/>, last accessed on 01.06.2014.

⁶⁹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0230&language=EN>, last accessed on 01.06.2014.

result which is very difficult to achieve on such an important piece of legislation). On the other hand, on the “Police directive” the majority is different (54%) and it is a sign that there are still those (particularly on the right) that prefer a more a pro security stance.

The 1st reading position would go against many of the remarks made by the US. But the process is not over and there are several arguments that would indicate that the final outcome will be somewhat closer to the US position, while still leaving many aspects of disagreement.

The next player in the legislative process is the Council, where negotiations have been more difficult than in the European Parliament. There is not yet a “general approach”, which would allow for the start of trilogues. What was negotiated until now⁷⁰ already presents differences from the EP approach, for example by reverting to “unambiguous” consent used in the 1995 Directive, rather than “explicit” consent used in the new proposal. In addition, in the new context dominated by Ukraine security concerns, the TTIP negotiations, which interest considerably member states, it is possible that the Council will be more “flexible” than the Parliament in its approach. Similarly, the Council has not introduced an anti-FISA clause in its partial general approach on the chapter on international transfers.⁷¹

The European Parliament elections will also have an impact on its position. The lobbying from US and European companies has been extremely intense.⁷² The position of one of main EP committees - the Industry & Telecoms Committee was, as a result, closer to the positions expressed by companies.⁷³ Nevertheless, in the context of the approaching elections and the NSA surveillance scandal, it was more difficult for MEPs to go against the “rights of the citizens” and therefore they voted massively in favour of the report of the Civil Liberties Committee. For several reasons, this situation might reverse. Relieved of

⁷⁰ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010227%202013%20ADD%201>, last accessed on 01.06.2014.

⁷¹ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010349%202014%20INIT>, last accessed on 01.06.2014.

⁷² <http://edri.org/files/eudatap-03.pdf>; <http://lobbyplag.eu/map>, last accessed on 01.06.2014.

⁷³ <http://edri.org/itre-eudatap/>, last accessed on 01.06.2014.

the pressure of elections, many MEPs (in particular from Central and Eastern Europe, but also from the UK and Ireland) will be more open to arguments of “administrative burden” from the industry. In the Ukraine context, many are also likely to be more sensitive to US positions. The extremist/eurosceptic forces are likely to vote against almost any kind of deal, or will vote depending on the political mood of the moment, making them unpredictable. Absolute majority (required for an EP second reading position which diverges from the Council position) will therefore be more difficult to achieve. So, despite the strong majority in the vote, the EP may have a weaker hand in the negotiations, knowing how difficult it will be to adopt positions which are different than the ones of the Council. Then, there is also the time factor. On top of the European Council deadline (2015), the EU has an interest to set in stone clearly and early a data protection legislative framework which will serve as a reference point to the rest of the world and give it a strong negotiating position.

While the final outcome could be less problematic for relations with the US than the current EP 1st reading position, there will still be a need for negotiations in order to reach a common understanding and allow data to flow between the two. Let us now see in which direction is the reform process in the US heading.

3.2 Internal reform process in the United States

The best indication at this moment regarding the direction of the reform process in the United States is given by the Podesta and PCAST reports, as well as by the Freedom Act (with regard to NSA surveillance).

There are many positive elements, but also some which continue to diverge on essential issues from the EU position, as well as some veiled criticisms of the EU approach.

One helpful suggestion is to remove the distinction between metadata and content, as this allowed lower protection standards to be afforded to the former (e.g. collection of metadata under Section 215 FISA). This would also remove a major difference between the US system and the EU one as the latter does not recognize such distinction.

On the content and flexibility of data protection rules, major differences are likely to remain. The White house reports criticise the EU approach to data protection (without naming the EU): PCAST is "not aware of more effective innovation or strategies being developed abroad; rather, some countries seem inclined to pursue what PCAST believes to be blind alleys. This circumstance offers an opportunity for U.S. technical leadership in privacy in the international arena, an opportunity that should be taken" (PCAST, 2014, p. xiv). And, with regard to innovation and business friendliness – "policies focused on the regulation of data collection, storage, retention, a priori limitations on applications, and analysis (absent identifiable actual uses of the data or products of analysis) are unlikely to yield effective strategies for improving privacy. Such policies would be unlikely to be scalable over time, or to be enforceable by other than severe and economically damaging measures" (PCAST, 2014, p. xiii). The Podesta Report also strongly questions whether approaches based on information and consent of data subjects are still adapted to the "big data" era, compared to alternative approaches proposed in the US which would rely, to a greater extent, on context of data collection and use (Podesta, 2014, pp. 54-56). Major US companies active on big data are pushing for a limitation of the individuals' rights with regards to their data, which is not acceptable under the EU legal system. It still looks difficult to reconcile this with the EU approach to put the individuals' control of their personal data at the heart of the system, while allowing flexibility through six grounds for processing (such as legitimate interest of the company having the data), apart from the main one – consent of the individual.

With regard to the issue of non-discrimination, Podesta report only addresses this in a limited way. It is not expected to include access to judicial redress under the Privacy Act, which would require a legislative change. As far as NSA surveillance programmes are concerned, even the limited extension by the Administration of the 1974 Privacy Act to non-US persons will have no impact on these programmes (under Section 702 FISA) as they are excluded from the scope of the Act.

The Freedom Act, which has been proposed in October 2013 as a response to the NSA revelations, was supposed to end the bulk collection of metadata, end the secret decisions procedure of the FISA court, and introduce a "Special Advocate" to argue for the

public and for privacy matters. Other proposed changes include limits to programs like PRISM, which “incidentally” retains Americans’ Internet data and greater transparency by allowing companies such as Google and Facebook to disclose information about government demands for information. However, the form that passed the House of Representatives is not only insufficient to end bulk collection, but the freedoms therein only apply to Americans, excluding therefore EU citizens and strengthening the legal framework for discrimination.

These moves are a step back, and certainly no progress, from the November 2013 press statement after the EU-US JHA ministerial meeting: “We are committed to working to resolve the remaining issues raised by both sides, including judicial redress (a critical issue for the EU). Our aim is to complete the negotiations on the agreement ahead of summer 2014.”⁷⁴ It also does not seem to fit with President Obama’s statement of 17th January 2014 – promising to take “the unprecedented step of extending certain protections that we have for American people to people overseas.”⁷⁵

3.3 Negotiations for an EU-US framework agreement for data transfers for law-enforcement purposes (“umbrella agreement”)

The issue of judicial redress for EU citizens is one of the key issues in the ongoing negotiations for an “umbrella agreement” between the EU and US, which would set the framework and the key principles, for personal data protection, when such data is transferred across the Atlantic for law enforcement purposes. Such a deal would facilitate sectorial agreement (such as Passenger Name Records, TFTP) or bilateral agreements with Member States, which ensuring compliance with EU data protection framework.

The EU negotiation mandate⁷⁶ means that the agreement would have to:

⁷⁴ http://europa.eu/rapid/press-release_MEMO-13-1010_en.htm, last accessed on 01.06.2014.

⁷⁵ Barack Obama, “Remarks by the President on Review of Signals Intelligence,” White House, January 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>, last accessed on 01.06.2014.

⁷⁶ http://europa.eu/rapid/press-release_IP-10-1661_en.htm, last accessed on 01.06.2014.

- provide for a coherent and harmonised set of data protection standards including essential principles such as proportionality, data minimisation, minimal retention periods and purpose limitation;
- contain all the necessary data protection standards in line with the EU's existing data protection rules, such as enforceable rights of individuals, administrative and judicial redress or a non-discrimination clause;
- ensure the effective application of data protection standards and their control by independent public authorities.

A leaked Council document containing a non-paper of the Commission⁷⁷ from April 2014 refers to the items on which provisional agreement exists – and the list is quite significant. It notes that discussions are ongoing, but have not yet been fruitful on non-discrimination: “The two sides are working on a non-discrimination clause that should guarantee that the Parties will **apply the provisions of the umbrella agreement without discrimination between their own nationals and residents and those of the other Party**. Such a provision has the potential to complement or even strengthen other provisions of the future agreement (in particular those providing safeguards to individuals) by contributing to ensure that Europeans will benefit from equal treatment with US citizens when it comes to the implementation of the agreed provisions by US authorities”.

However, it specifically avoids the “question of avenues of judicial redress for EU citizens when their data is shared with the US for law enforcement purposes as a satisfactory solution has not yet been found on this point.” It adds that “the Commission has made clear to the US that the creation of such rights either in the Agreement or in self-standing legislation is a key component of a deal.”

The next occasion where this deal will be discussed at high level is the EU-US Ministerial meeting of Justice and Home Affairs, scheduled for 25 June in Athens. But the problem is not (only) at the level of the US government. A key difficulty for the negotiations is the fact that it is only an “executive agreement” under the US constitution. This means that it does not have to be approved by the Congress, but cannot grant new

⁷⁷ <https://netzpolitik.org/wp-upload/2014-04-09-COUNCIL-8761-14.pdf>, last accessed on 01.06.2014.

rights⁷⁸. In order to obtain the right for judicial redress for EU citizens, Congressional action would be necessary. And taking into account the gridlock in the Congress and the fact that the Freedom Act does not include such rights, it is very difficult to see how this issue could be solved ahead of the “summer” deadline, or indeed in the near future.

But how can the EU influence the White House and Congress? We have seen that the US has lobbied the European Parliament and Member States on the reform of the data protection framework. It was probably not very successful, but the NSA surveillance revelations certainly have not helped. Has the EU attempted similar lobbying in the US? Delegations of the European Parliament have visited Congress and so have Commission representatives. Germany has attempted to negotiate a no-spy agreement. But in order to ensure non-discrimination of EU citizens and, therefore, to translate into practice the special transatlantic partnership, the intervention of Congress is required and for the moment nothing seems to show that they are listening, with some individual exceptions. Stronger cooperation, both from the European Parliament⁷⁹, but also from the European Commission, Member States and EU businesses would be necessary. But for a congressman, an EU actor is just another lobbyist, among the many that knock at their doors (and are prepared to make financial contributions).

The EU (and the Commission), in accordance with its main Treaty competence, is pressing for the economic component of the transatlantic relationship. However, any free trade deal is going to be politically sensitive and this is the case for TTIP, which was one of the most discussed issues during the European elections campaign, and not on a favourable note⁸⁰: “The end result [of the European elections] will be slower progress on a

⁷⁸<http://www.statewatch.org/Targeted-issues/EU-USA-dp-agreement/eu-usa-dp-info-exchange-agreement.htm>, last accessed on 01.06.2014.

⁷⁹ <http://www.fas.org/sgp/crs/row/R41552.pdf>, last accessed on 01.06.2014.

⁸⁰ <http://www.euractiv.com/topics/ttip>; <http://www.pressenza.com/2014/05/ttip-european-elections/>, last accessed on 01.06.2014.

deal. A comprehensive and ambitious TTIP is on its way to becoming a transatlantic mirage of President Obama's last term.”⁸¹

On the other hand, the US has for many years complained about the diminishing military resources of European NATO members. In 2013, the US Ambassador to NATO said: “America's European allies will no longer be able to stand beside us as we confront the security challenges of the future.”⁸² In 2011, the US defence secretary said plainly: “if current trends in the decline of European defence capabilities are not halted and reversed, future U.S. political leaders – those for whom the Cold War was not the formative experience that it was for me – may not consider the return on America's investment in NATO worth the cost.”⁸³ It is not only the military budgets that are allocated (justified by the crisis, but also by public opposition), but the fragmented nature of the spending, as only timid attempts for sharing resources have taken place.

Therefore, the EU member states have to pay more attention to these important US concerns, if it wants to be listened to at the highest levels in the US.

3.4 Mutual recognition - Safe Harbour decision

As mentioned above, the European Commission has adopted a list of 13 “recommendations” that the US must fulfil, in order to continue with the framework. Much information is not available about the ongoing discussions, except that they are taking place... The recommendations (a “real to-do list”,⁸⁴ as the Commission Vice-President in charge of the file, Viviane Reding, put it) cover transparency, redress, enforcement and access by US authorities. While the first ones are more technical in nature and could be fulfilled, the last two recommendations are strongly linked with the mass surveillance scandal:

⁸¹ <http://www.ft.com/intl/cms/s/0/09ac707e-e70c-11e3-88be-00144feabdc0.html>, last accessed on 01.06.2014.

⁸² Ambassador Ivo Daalder Remarks at Carnegie Europe, Brussels, <http://nato.usmission.gov/sp-06172013.html>, last accessed on 01.06.2014.

⁸³ <http://www.defense.gov/speeches/speech.aspx?speechid=1581>, last accessed on 01.06.2014.

⁸⁴ http://europa.eu/rapid/press-release_SPEECH-14-27_en.htm, last accessed on 01.06.2014.

“12. Privacy policies of self-certified companies should include information on the extent to which US law allows public authorities to collect and process data transferred under the Safe Harbour. In particular companies should be encouraged to indicate in their privacy policies when they apply exceptions to the Principles to meet national security, public interest or law enforcement requirements.

13. It is important that the national security exception foreseen by the Safe Harbour Decision is used only to an extent that is strictly necessary or proportionate”

In particular, on the last recommendation, the ECJ data retention judgement makes clear that massive and indiscriminate storage of data constitute an unjustifiable violation of fundamental rights, and in particular of the right to the protection of personal data. The detailed guidance contained in the judgment on the interpretation of the principles of necessity and proportionality will allow the EU to express its position clearer, but it will not necessarily help the outcome as the bar is raised very high. The decision on what is necessary and proportionate will be a political one. The European Parliament has called with an overwhelming majority for the suspension of Safe Harbour and the position is not likely to change. Unless the outgoing European Commission decides to suspend the agreement (which is unlikely), there will be a lot of pressure on the incoming Commission from the European Parliament, in particular in the course of the hearings of the new Commissioners.

3.5 Multilateral frameworks

There are two multilateral frameworks which are relevant for the topic of our paper – the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe.

The OECD has a Working Party on Information Security and Privacy (WPISP) where EU Member States (including the European Commission, as a non-voting member) and US counterparts work together and establish recommendations and guidelines. In

September 2013, the OECD revised its 1980 privacy & data flows guidelines.⁸⁵ While the basic principles are maintained (the collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation, accountability principles), new ones are added or revised, in particular strengthening the accountability of companies (which should implement privacy management programs and should notify data breaches), strengthen privacy enforcement authorities as well as improve global interoperability. The guidelines fit with the EU reform proposals in many respects, but they also support more flexibility for data flows, as argued by the US. They highlight the importance of a “risk-based approach”, whereby any restrictions on cross-border data flows imposed by member countries should be proportionate to the privacy risks associated with the personal data (Kuschewsky 2014).

In June 2007, OECD governments also adopted a Recommendation on Cross-border Cooperation in the Enforcement of Laws Protecting Privacy,⁸⁶ which also led to the establishment of a Global Privacy Enforcement Network (GPEN), where the EU data protection authorities and the US Federal Trade Commission also cooperate.

Since OECD only publishes recommendation and guidelines, it is clear that they are not a short term solution to bridging the transatlantic privacy gaps, however they represent useful principles and, in the long-term, they help towards reaching mutual understanding.

The Council of Europe is another multilateral framework relevant for our paper, under whose ambit the first international legally binding privacy instrument was established in 1981 – the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (also known as Convention 108).⁸⁷ There are several important elements in this context – the Convention has been signed by non-

⁸⁵ OECD, Guidelines Governing The Protection Of Privacy And Transborder Flows Of Personal Data <http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf>.

⁸⁶ OECD, Recommendation on Cross-Border Co-Operation in the Enforcement of Laws Protecting Privacy (2007), available at <http://www.oecd.org/internet/ieconomy/38770483.pdf>.

⁸⁷ <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>, last accessed on 01.06.2014.

European Member States; it is currently being revised⁸⁸ and, on this occasion, the EU will also accede to it as a member.⁸⁹ The United States is an observer in the negotiations on this convention and the Commission has called on the US to accede to it, which would considerably ease the adequacy process. However, the US has not expressed yet the intention to join.

4. Conclusion

The EU and the US differ considerably in their approaches to data protection, but in many cases the result is similar in terms of protection of privacy for individuals. However, the fundamental difference between the human rights / consumer law perspective leads to different priorities and interpretation of laws. While the US has consequently a problem with the EU system in terms of obstacles to data flows, lack of interoperability and flexibility, the EU is concerned with discrimination of its citizens and inappropriate enforcement of existing agreements. The NSA surveillance scandal has exacerbated the attention to this issue. Ongoing reforms are taking place on both sides of the Atlantic and, while the current gap could be narrowed in some respects, it may be widened in others. In the short term, it is unlikely that bilateral negotiations will be fully successful in reaching the objectives. In the medium to long term, pressure from businesses caught in the middle, economic and technological reality, discussions in multilateral frameworks and the important common objectives and shared values should favour a compromise.

⁸⁸ http://www.coe.int/t/dghl/standardsetting/dataprotection/modernisation_en.asp, last accessed on 01.06.2014.

⁸⁹ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207234%202013%20REV%203%20EXT%201>, last accessed on 01.06.2014.

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**GLOBAL DEVELOPMENTS AND LOCAL COMMUNITIES.
TOWARD A POST-DEVELOPMENTAL PARADIGM OF TRANSATLANTIC
STUDIES**

Dr. Șerban Văetiș

Lecturer

Babeș-Bolyai University, Cluj-Napoca, Romania

vaetisis@yahoo.com

Abstract: *The paper draws on the responses provided by local communities to various development projects, in North and Latin America in recent decades, as a revised perspective on global evolutions and transatlantic studies. The focus is mainly on the indigenous populations, rural marginal communities and urban minorities that, within the various processes of development, are negatively impacted by national and international projects. The paper briefly analyses their condition, improvement, resistance and reactions as cultural phenomena, i.e. related with their historical pasts, cultural heritages and traditions of submission, slavery, discrimination and rebellion; within the new context of global economy as 'neocolonial' paradigm, in which a series of community values, social practices and economic needs are severely neglected, in the name of 'development'. Colonial legacies, indigenous movements, alternative community projects and local responses to global developments will be all considered in the context of global neoliberalism, as relevant subjects for the transatlantic region, the international evolutions and a reconfigured post-developmental paradigm.*

Keywords: American communities, globalization, local resistance, post-development, community studies

1. Introduction: neglected actors and negotiated identities

A range of aspects and issues of American history, society, culture and politics, regarding both North and Latin America, refer to the mechanisms of constructing local communities and identities (Alperson 2002; Kraay 2007), to the way in which these accommodate and resist to national and global forces (Robbins 2002; Peacock 2005), as well as to the strategies adopted as responses to the various forms of development they are targeted (Siriani and Friedland 2001; Pavel 2009). These aspects represent and reflect

substantive concerns and evolutions of American communities that ultimately impact on the social-cultural and political-economic configurations of the transatlantic hemisphere.

It is thus, in a way, quite surprising that the American and Transatlantic studies disproportionately focus on the ideological underpinnings, geopolitical constellations, and large-scale economic practices, in spite of the richness and diversity of culturally local, regional and community creations, which actually respond to the interventions and transformations taking place in society, economy and politics.

This article is deliberately written from the perspective of local and regional communities with their particular characteristics and issues they face, implying that these often represent neglected actors and dimensions of the political analyses and of the international relations and theories. In the same time, this perspective implies that only studying these local cases one can build a proper understanding of the various, but related, contemporary problems and evolutions, in an increasingly globalized world.

Three examples. The highly regarded social role played by the indigenous rural illiterate Peruvian and Bolivian women (*cholas*) seems an unconceivable thing; yet they managed to create a political identity and activity, useful for their needs and as mediators between classes, ethnicities and genders in the context of rapid urban development affecting many 'unprepared' communities in South America (Kellogg 2005). In North America, Native communities opposed a project of oil pipeline expansion that would cross a main water source for several Indian reservations, threatening their water supply (Hotakainen 2014); they not only rejected this development but also built community resistance, invoking historical practices of using natural resources and involving traditions of anti-assimilationist attitudes against governmental projects. A small agricultural community in Costa-Rica opposed a development project that would affect the market of their subsistence crops; they also set forth a program of community development that combined environmental conservation, small-scale tourism, and the empowerment of marginal members of the community (Jackiewicz 2006).

These examples (two of them to be detailed later in the article) and hundreds of similar cases across the Americas can be included in a series of actions characterized by resistance to global/international projects, and by proposals for alternative projects of local

developments/benefits. From these some are better known and researched, such as the Zapatista Movement driven by rural Southern Mexicans against unfair trade agreements (Harvey 1998), or the recent anti-World Cup protests in Brazil against the use of funds for non-sustainable infrastructure (Zirin 2013), but the vast majority remain unknown and barely referred to in the international analyses.

However, these community resistances are striking forms of *negotiation* and *empowerment*. As Jackiewicz put forward: “It is overly romantic to assume that small rural communities can preserve their isolation and traditional way of life forever without compromise, negotiation, and/or transformation; nor do they necessarily want to. Rather, their goal is to negotiate their own reality, and many agree that this needs to begin at the community or grassroots level.” (2006, p. 139). Furthermore, it is more than negotiating the reality; as Kraay (2007) suggested in a complex analysis about impoverished transnational Hispanic migrants, it is about negotiating identities. These people, desperately or tactically, do something so as to not let others to decide over who they are, what to do, and what’s good for them. They putatively perceive development as another ideology, or at least as a new form of colonial imposition. Not surprisingly, thus, one can find these forms of resistance in communities nurtured by traditions of anti-colonial experience (indigenous communities in Latin American countries), hostility to internal colonial practices (Native Indians in North America), and opposition to assimilation practices (transnational immigrants and rural folks). Their power resides in the very act of resistance; and their genuine form of empowerment in the building of new senses of community around the practices of resistance and the alternatives to imposed developments or proposed evolutions of their condition and identity.

Talking about ideologies, it is to be reminded that one of the most influential political analyses and dogma is that nations are divided in *development-prone* and *development-resistant* societies (Harrison and Huntington 2000). This is in itself an ideological perspective since it is suggested, firstly, that the world should be necessarily split between developed and un(der)developed countries/regions, and secondly, that a unique version or option for development does exist only, in a place and time, and that regions and communities that oppose certain projects need to be ‘developed’. With this

general assumption, frequently taken for granted, it refused the very supposition that local communities may have the interest, the strategies, the knowledge and the power to propose alternatives to global developments. Not surprisingly, then, people affected by various development projects become angry and, frequently, their resistance takes the form of protest. Within the current political interpretation, however, in the vast majority of cases, except the cases of massive manifestations, such as the *indignados* or *occupy* movements, these are not recorded and referred to as political events or as actions having any political effect.

As it will be suggested later in the article, however, their activities do have effects; if not at national and international levels, certainly in the way in which these communities evolve.

2. Global developments and local communities. Critical geopolitics of Euro-Atlantic civilization

The current interpretation of ‘political events’ and ‘social protests’ appears to favor a rather simplistic perspective, of a ‘global’ approach, thanks to values and projects thought upon as universalistic, without much circumspection about the cultural particularities of social contexts and the communities within which these events take place.

This is not necessarily a new approach, since it can be reconstructed a rich tradition of Western representations of the ‘uncivilized’, abounding in conventional interpretations of such *others* as: the ‘barbarian’, the ‘Orient’, the immigrant, the minority, the unemployed or the protester, whom the ‘civilized’ need to repudiate. This repudiation takes several forms: through highlighting some *negative differences* that various communities exhibit (in fact, ultimately, such labels as ‘underdeveloped’ or ‘development-resistant’ represent negative characteristics); by warning about the *dangers* and *threats* to some normative and abstract *status-quos* (such as ‘civilization’, ‘institutional order’, ‘freedom and democracy’, ‘national tradition’, even ‘commonsense’) posed by these others; and by suggesting some *interventions* needed with the purpose of re-establishing order (seen as state order, as world order or, simply, an order of things back into shape).

Critical geo-politics. The above description illustrates the insidious logic of *geopolitics*, which became over the past decades a kind of mandatory discourse of analyzing political events, regardless of whether they refer to decisions taken by state or international leaders, or of social crises generated by the political actions or bad management. Moreover, the geopolitical discourse suggests that any ‘development’ has to be, somehow, part of a ‘global development’ (Kearns 2003), coordinated from a strategic center, and controlled by the ‘global powers’ with the consent of the political, economic or cultural elite. This hierarchical and globalizing perspective tends, consequently, to present any region or resource as an approachable and politically/economically controllable thing, denying the roles that may be played by local strategies and interests. In a way, according to this vision, everything is driven and can be explained by ideologies (justified by history, traditions or economic profit), international organizations or secret services (revealing a fascination with power and hidden connections), in spite of the manifested interests and open activities of these communities.

The uses and abuses of geopolitics as explanatory discourse and influential theory among decision-makers have definitely strengthened the ideological sense of development as tool of (and almost synonymous term for) modernity, prosperity and success. But, since many development plans, be they large-scale national projects or regional investments, proved unsuccessful or, even worse, negatively impacted natural, social or economic environments, increasing skepticism was expressed about the uniqueness of the ‘development formula’.

Global development. In a sense, the idea of a ‘global development’ was primarily criticized from the dual perspective of *localism* and *particularism*. Besides the common disapproval of geo-politics, that accuse its geographical determinism and reveal its discourse of power and control ‘from above’ (Routledge 2003), other critical perspectives have attempted to reveal how local practices and particular interests of regions and communities are aggressively denied and disregarded in the name of ‘global developments’. The emphasis put by this criticism on local communities was meant to re-balance the overrated importance played by ‘foreign policy’ and ‘global ideologies’, in

relation to which subaltern position was assumed by those subjected by universalistic and centralist positions of power (Sharp 2011).

In sum, the argument against the idea global developments was primarily formulated from an anthropological post-colonial perspective that revealed the equally important role played by local cultures and communities in any developmental project, and drew parallels with the historical colonial projects that affected communities, regions, nations and continents in the name of civilization, modernization and development. In this last idea, many recent analysts (McCann and McCloskey, 2003, for example) showed how the ‘institutional instruments of globalization’, among which the International Monetary Fund or World Trade Organization managed an insidious recolonization process of the underdeveloped ‘Third World’ by economic means.

Besides these critical positions, increasingly vocal over the past decades, especially in the context of the current crisis of neoliberal capitalism, some typical shortcomings or contradictions were also formulated. For example, McMichael (2009) underscores the contradictions of the global development projects in relation with ecological and climatic issues, and Sengupta (2011) reveals the weakness and failures of global governance on health issues across the globe etc. All these criticisms have re-questioned the centrality and universalism of the Euro-Atlantic modernizing project, fueled by Western political-economic and civilization models and the general geopolitical discourse on global development.

Multiple modernities. At this point the ‘critical geopolitical’ (Ó Tuathail 2005) perspective combined with revised historical interpretations of modernity. Writing from an anthropological perspective, Comaroff and Comaroff (1993) had already demonstrated that, culturally speaking, we have to talk about ‘multiple modernities’. Each nation, each society, each community, in historical retrospective, formulated their own versions of what would mean *modernity*. The Western model of modernity appears, thus, decentered and suitable for critical deconstructions, since other models can be viewed as more suitable (or historically proper) for non-Western regions. And this is understandable even without conducting complex research in Africa or Asia. Everyone can remember that, till relatively recently, half of the European continent, the so-called Soviet bloc, had their own formulas

and discourses of modernity. According to their official propaganda and common perception of socio-economic reality, the former communist countries in Central-Eastern Europe and Eurasia were modern. They were fully modernized as a result of aggressive processes of industrialization, urbanization, and literacy campaigns. Yet, according to Western Euro-American standards they were not modern. This simple comprehensive example suggests not only how the acknowledgment of ‘multiple modernities’ may generate powerful counter-tendencies to what is conceived of as Western modernization, but also increased focus on localized practices and local (both Western or non-Western) forms of modernity, i.e. something that could be referred to as ‘localized modernities’. Hence the necessity of reevaluating the ‘modernizing project’ and the increased importance gained by local communities in recent interpretations.

All these considerations, regarding social crises, political action, geopolitical discourse, global development and multiple modernities, result in a new theoretical model that manifestly reconsidered the ideology and practices of development.

The post-developmental paradigm. An increasing series of studies over the past decades have shown how ‘development’ not only function as a Western-centric ideology (Tucker 1999), but also may generate negative impacts on local economies and communities (Amin 2011), and have consequently suggested new paradigms of understanding social and economic evolutions (Nederveen Pieterse 2010). These can be roughly put together within a so-called ‘critical development theory’ (Munck and O’Hearn 1999) as a new, alternative or post-developmental paradigm calling for *sustainable development* and *limitation of growth* (Danilov-Danil’yan, Losev and Reyf 2009), *smart growth* (Bullard 2007), *human-scale development* (Max-Neef 1991), *non-universal, non-progressive development* (Sachs 1997), or plainly conceptualizing a *post-development* (Escobar 1995; 2007).

Surely, one can trace back this paradigmatic theory to the philosophical conservatist (Burke), romantic anti-modernist (Thoreau), political anti-capitalist (Marx) or ideological anti-hegemonist (Gramsci) traditions in the Western thought, but, in another vein, it is relied on quite ‘technical’ assumptions, such as those demanding the use of renewable energy and materials, the building of livable neighborhoods, the preservation of natural

areas and traditional cultural practices and the consolidation (not destruction) of equitable small-scale production economies etc. These visions, on one hand, are generated by opposition to perceived imposed projects and systems, as well as resistance to colonialism, neo-liberal corporatism and globalization, and, on the other hand shaped by local alternatives to compelled forms of society and economy, alternatives seen as smarter, healthier and more beneficial socio-economically for the communities. Everything is ultimately related with the reconsiderations of geopolitical global development and Western modernity, discussed before.

Broadly, Escobar (1995, p. 215) describes post-development as a dismissal of development paradigm, suggesting both an alternative to development as totalizing (Western) paradigm or ideology, and an interest in local cultures and practices. Thus, over the last decades, there has been growing attention not only to such concepts as multiple (or parallel) modernities, local modernities, decentered Western-centric development, anti-ethnocentric development etc. (Nederveen Pieterse 2010), but also to constructing a new 'post-developmental' paradigm within which to situate the criticism, to interpret the diverse unorthodox evolutions across the world and to assess the alternative socio-economic formulas to 'development'.

The following responses provided by some communities confronted with issues of development will illustrate these theoretical considerations.

3. How do communities respond to global developments. Five cases studies

The cases presented as follows document various forms of resistance to different types of developments by local communities across the Americas, that have been found in critical situations and have attempted and managed to improve their condition through post-developmental approaches.

Indigenous rural communities. Since the discovery of America and succeeding European exploration and colonization, the local indigenous communities (the Indians) and their lands have been continuously targeted by development and modernization projects. Extermination, relocation, forced urbanization, destruction of natural and socio-cultural

environments are among the most documented impacts brought by Western civilization models and development programs to these people. Within the contemporary global context, various projects aimed at developing the undeveloped areas where such indigenous people still live, especially in Latin America, affect them in new ways. They are not those rural ‘uncivilized’ isolated and exotic people anymore (even if many discourses persist in depicting them as such), but are connected to the modern world economically and culturally, through direct contacts, exchanges and information provided by the higher mobility and technological advance they rely on today. Especially because of this familiarity with two worlds, these people end up to intercede between otherwise hardly related worlds.

In the context of aggressive urbanization, frequently generating ‘fractured cities’ (Koonings and Krujit 2007), Andean indigenous women, historically referred with the negative term *chola*, managed to achieve unexpected key social-economic positions through transcending the gaps widened in the evolution of their societies in such countries as Peru and Bolivia, and mediating between indigenous and European, rural and urban, domestic and public, local and official, traditional cultural and political modern spheres (Kellogg 2005, chapter 5). Even if this example is not necessarily a very evident illustration of ‘community resistance’ to ‘global development’ it does engage a complex reconsideration of community values, which involves creativity in their social activities, while genuinely setting themselves within the political participation and agenda.

As Kellogg details: „[These] [w]omen have also played an important role in the resistance of indigenous and peasant peoples to ongoing modernizing and nationalizing projects that result in the impoverishment and weakening of the region’s indigenous identities. Women’s work has played a key role both in maintaining indigenous communities and in negotiating and ameliorating many of the sweeping economic, political, and cultural changes faced by rural communities, along with the large numbers of migrants, male and female, flooding cities like Lima, Ayacucho, Quito, and La Paz” (p. 129).

Being closer to traditional practices in housekeeping, cuisine, rituals and domestic economy, these women succeeded better in the fight for cultural survival. In the process of

resisting outside developmental forces that would definitively transform or wipe out their communities, they also managed to empower different categorical identities they belonged to such as Native, woman, rural, poor, and even created new political agendas to be taken into consideration by further projects in the region, such as those regarding indigenous rights, land use or cultural heritage preservation (cf. Kellogg 2005, chapter 6).

Building community in the era of modernization and globalization. A similar form of empowerment through community building against the forces pushing to dissolve the community bonds and practices is documented by Jackiewicz (2006) in the case of some Costa Rican rural agricultural communities. Locals in Quebrada Grande engaged in small-scale development initiatives meant to compensate the lack of benefits received from the grand businesses developed in the region, primarily tourism, but also cheap agricultural imports made possible by the North American Free Trade Agreement (NAFTA), that affected the market of their local agricultural products. This kind of local, alternative development (to the ‘official’ massive development in the region) is described, in the context, as a proactive stance toward improving the quality of life by people negatively affected by these aspects of globalization.

“One of the noticeable aspects of these changes within the community [brought by this alternative community response] is the increase in wealth not in the purely economic sense but in terms of satisfiers.” notices Jackiewicz. “The cooperation between individuals in the community has strengthened friendships, increased responsibility and trust, the sense of belonging, and self-esteem, and created more leisure time” (Jackiewicz 2006, p. 144). On the other hand “[t]he relationship with VIDA [Association for Volunteerism, Environment, Research and Development] gives them a consistent source of support and access to skills and knowledge [...] The establishment of connections at the national level also provides them access to the technical and professional assistance of the government, and this assistance has helped them obtain a grant that has created new avenues of opportunity and helped them to implement their plans.” (Jackiewicz 2006, p. 144)

Similarly with the abovementioned case of Andean indigenous women, these Costa Rican rural people are connected with both the traditional culture of their village communities of origin and the modern political world. They are (as Jaciewicz suggests

adopting Escobar's terminology on post-development) good examples of 'cultural hybridity'. In this sense, they are focused not only on maintaining specific/traditional forms of sociability and economy, but also to attaining linkages with nongovernmental organizations and collaboration with governmental agencies in order to improve their condition of empowered modern citizens.

Tourism and upscale housing development. Tourism is often referred to as a typical form of 'global development' impacting regions worldwide. Tourism brings not only passing tourists but also may increase interest in developing upscale resorts, residential areas and retail business. This generates social-economic changes through changing demographic structure, transforming patterns of sociability and culture, creating new segregations and raising prices among others. In some cases the transformation of an area into a tourist spot and upper class or retirement residential area interfere with legal and racial aspects, as illustrated in this third case by Rivers and Stephens (2009). The African American communities living on the Sea Islands off the South Carolina US Atlantic coast responded through activities of information about their inherited lands and cultural heritage in the region, as well as by opposing the ongoing acquisition of land by outside speculative developers. Significantly, these actions were consciously connected with the historical struggle these local black communities went through for their civil rights and against racism in the past.

The authors describe this case as a typical illustration of the difficulties in fostering equitable development because of the tendency among locals to cede their land to developers in order to get some immediate benefit. Their ownership has been mostly inherited from the purchases by their ancestors, former slaves, who received this right after the abolition of slavery during the Reconstruction Era in the region. What is lost in this business is not only this symbolic connection with freedom, but the very opportunity of living and working on that land thereafter, other than working in tourist services or housing maintenance on low salaries for rich outsiders, in an unequal power relationship reminding the slavery times. "[This] community has been under pressure by market forces for several decades. Living in the shadow of the region's embedded racism, many long-term residents have been left without the benefit of legal protection. Conventional representations often

separate urban and rural development, viewing African-American relationships to the land as being of marginal importance. [...] Yet, this loss of land in South Carolina's coastal region, given its origins in the failures of post-Civil War Reconstruction and in the ensuing institutionalization of racist practices, has significant regional equity implications. Developers of retirement homes and resort areas in South Carolina and other places in the Southeast have realized windfall profits from speculating in these valuable coastal properties. As a consequence, large extended families have been forced to relinquish their land for pennies on the dollar [...] What once was primarily an area of bedroom rural communities is now becoming populated with transplanted retirees, upscale resorts, gated communities, and exponential growth." (Rivers and Stephens 2009, pp. 157, 183)

This case describes the story of how heirs' property owners have been helped to retain their property in the face of developers' determined efforts, through education about their property rights and through direct legal support. This was provided through the help of such local associations as The Heirs' Property Preservation Project or The South Carolina Bar Foundation. This involvement exemplifies not only support for residents to secure the rights to their land, but also the efforts put forward to reconnect local people with a symbolic element of their emancipation and local cultural-historical backgrounds and, ultimately, to foresee and create alternative responses to development.

Industrial development vs. civic environmental organization. A similar yet much different situation, this time in the state of Rhode Island, is documented by Sirianni and Friedland (2001). This time, the problems that a local community face are not legal or racial, but ecological. Save The Bay, a statewide civic environmental organization illustrates a case of a local oppositional group that constituted itself as a working organization whom activities strengthened the community bonds and provided knowledge for their actions. It aimed primarily at stopping development projects that have had negative impacts on environment, while combining in their activities advocacy, policy design, education, and habitat restoration. It involved the work of different members of community, including children, who eagerly helped with researching the quality and composition of water, soil and marine plants in the degraded bay due to industrial development. This organization and their actions are part of the local history already, and

lastly their convergent activities resulted in stimulating new sentiments of community participation.

“In the early 1970s citizens of the Narragansett Bay Homeowners Association and Save Our Community formed Save The Bay to stop the construction of an oil refinery in Tiverton, Rhode Island, and twin nuclear power plants at Rome Point. The bay had been degraded during two centuries of industrial development, initially by woolen and cotton mills, then by fertilizer plants and paint factories, and more recently by jewelry manufacturing and electroplating. Urban development and suburban sprawl added new sources of nonpoint pollution, such as roads and shopping malls, and sewage systems needed major upgrading. As citizen efforts expanded, Save The Bay emerged over the next decade as an effective statewide citizen action group that repeatedly engaged in legal and political confrontation with local and state agencies and polluting corporations” (Sirianni and Friedland 2001, p. 2).

The actual association’s activities on the bay area can be described in two stages, including, firstly, the identification of common interests, with emphasizing recreational and fishing uses available to all members of the community, and, secondly, the need to preserve the environment in face of degradation. “Rather than drawing stark lines between the evil polluters and the good guys [...] Save The Bay chose to downplay conflicting interests and ideologies and to avoid purely obstructionist methods that stopped short of solutions. It began to build new public relationships with boating and fishing groups, schools, civic associations, businesses, and regulators.” (Sirianni and Friedland 2001, p. 2) This alternative vision on development, taking into consideration the needs and the future of community, could be traced back to a local tradition of opposition to unsustainable development, but also to the current efforts, creatively and efficiently put together by people searching for cooperative solutions, who feel and recreate sentiments of belonging to a community.

Bad urban development vs. community organized as public service. This last example, provided by the same Sirianni and Friedland (2001), illustrates the way in which the lack of proper public investment may generate the reaction of affected communities to create their own developmental projects, as alternative solution to (lack of) ‘official’

development. It is about the Communities Organized for Public Service (COPS), in San Antonio, Texas, a largely Mexican American coalition of congregations dedicated to transforming poor and working-class communities. This coalition has, as well, a long history in the city, and has evolved, similarly to the abovementioned case, “from a confrontational style of community organizing to one based on collaborative public relationships rooted in faith, family, and democratic accountability” (Sirianni and Friedland 2001, p. 2). The problems these disenfranchised communities face are, among others, lack of decent public services, deteriorated houses, ethnic segregation. These problems are continuously aggravated due to suburban sprawl and lack of interest in improving the living condition of economically unappealing neighborhoods. Instead of creating their own enclaves of poverty, violence and marginalization by involving themselves in self-segregation and criminal activities, some communities, by joining this coalition and their activities, managed to organize themselves around some inner values, such as family life, religion and communal participation in order to connect citizens to public life and attempt to improve their condition.

“COPS has learned to leverage power based on effective advocacy into complex civic partnerships and innovative policy designs. As part of a larger IAF⁹⁰ network, it has been able to diffuse innovative practices on the state and national level, as well as learn from other groups within the network. [...] Today, nearly two hundred such organizations are active in cities across the country, as are hundreds of other faith-based community development groups with different organizing models. They possess increasingly sophisticated training and funding supports and growing capacities for interracial community collaboration based on shared religious values and an organizing model that builds upon what unites people rather than what divides them” (Sirianni and Friedland, 2001, p. 8). This illustrates, ultimately, the way in which local initiative and action can have broader impact and participation, even at national and international levels, without necessarily being a project imposed from above as global program, but gradually developed from below, as a response of the population in need.

⁹⁰ Industrial Areas Foundation, the USA’s oldest community organizing network, founded in 1940.

These five cases represent different forms of responding to problems affecting local communities, as resistant, alternative, creative and collaborative solutions found by its members. With the help of some organizations and alliances, but primarily relying on their cultural traditions, economic practices, social connections and histories of submission, slavery, discrimination and rebellion, they managed to go beyond the marginal conditions and stereotypes of poor, uneducated, criminal communities, through resisting the compliance to global models imposed from outside, as strategies to ‘civilize’, ‘modernize’ and ‘develop’ them.

4. Conclusions. Toward a post-developmental transatlantic perspective

This article brought together social, cultural, and political theories and interpretations; suggested ethnographic descriptions and comparative case studies; drew on urban, ethnic and community studies; and adopted both local North and Latin-American, and transatlantic and global perspectives.

Its major goal was to clarify a series of evolutions regarding the functioning of communities and the community policies in various cultural contexts, especially as reactions to developing projects imposed from above. I implied that, in many analyses (including American and Transatlantic Studies), the roles and activities of local communities are disregarded or downplayed. In an attempt to balance this state of affairs I re-evaluated the importance of their activities, their modalities of understanding and reacting to contexts and processes of development, more frequently formulated in national and global terms. From this perspective my analyses reconsidered the relevance of some projects aiming at integrating community values and attempting to provide alternative responses to imposed development projects. As a consequence, these community efforts generated effects far beyond their strict preoccupation with development.

The indigenous women living in the Andean region have provided strong public and political models that gradually contributed to the acceptance of women in the political life, contradicting their image of domestic housekeepers in traditional societies. A direct

consequence of their visibility and activity in the resistance movements and as social mediators is the common high political positions occupied by women across Latin America over the past decades, including as many as seven women presidents after 1990 (in Bolivia, Nicaragua, Ecuador, Panama, Chile, Argentina, Costa Rica and Brazil), in a shift that made commentators to talk about a “move over machismo” and “a global example for women in power” (O’Reilly 2013).

In Costa Rica, a poor rural community succeeded to play not only a mediating position between large-scale and small-scale development, but also to construct a genuine ‘hybrid culture’, characterized by both local and global elements, on which their activities relied, in their efforts to improve their living conditions, much affected by global developments. This contributed to reversing the negative repercussions of the globalization and tourism, and the negative portrayals of the hosts as helpless victims of savage capitalism.

In South Carolina and Rhode Island US coastal regions, local communities responded to issues of speculative and unsustainable developments that aggravated racial hostility and environmental degradation. They managed to ‘get grounded’ in their region and, with the help of some organizations, to learn about legal, cultural, ecological or social aspects of their communities, useful for their community life.

Finally, the ethnic community in San Antonio, Texas only added another idea about how is that possible to improve the living conditions of community and the economic, political and natural environments within which they live by emulating activities from below, and not necessarily from above, in form of governmental, national or global projects. Here, in San Antonio, a Mexican community affected by bad urban management and poor neighborhood infrastructure, according to many stereotypical descriptions and ideological discourses, ‘should’ have ended up in poverty, marginalization, violence and illegality. Nevertheless, they succeeded to go beyond these ‘expectations’ and to create rich connections with families, community organizations and national civic associations, proving (again) that the global analyses could be contradicted by the grassroots evolutions.

In review, a general characteristic of these communities is their *openness* toward implying as many and diverse as possible people and organizations: locals, politicians, institutions, various categories of people, of different classes, genders, races, ethnicities, ages, and professions, i.e. moving away from the traditional images of isolated/poor/rural/ethnic communities. Another evolution in the case of these communities is a shift from oppositional and confrontational attitude (typical for the period from 1960s through late 1980s) to a *collaborative* approach, interested in *learning* about their past and in *informing* themselves about opportunities. In this sense, from market vendors, agricultural workers, immigrant service workers, fishermen, teachers, school children or retirees, to scuba diving clubs, neighborhood associations, land trusts, town councils, environmental advocacy groups, local conservation commissions, civil rights organizations, private foundations, regulators, federal government and churches, a rich variety of backgrounds, skills and interests were put together in *different innovative approaches* that not only founded the fertile soil for good local evolutions, but also fostered civic culture and social capital among otherwise disenfranchised and marginal populations.

These represent striking examples of local developments very little related and, in many cases, opposed to official, outside and global projects of development. On the other hand, these also illustrate how the lines between traditional and modern, rural and urban, undeveloped and developed, North and South etc. are, in a way, becoming increasingly blurred, demanding a new way of conceptualizing societies. This observation suggests, in the same time, a reconsideration of how we conceptualize and utilize the historical, cultural and political analysis in the transatlantic world.

Such topics and issues revealed throughout the article as civil society, social capital, community empowerment, community strategies, civic renewal, responses and resistances to local/global policies and ideologies, marginalization, insecurity, creative action in different contexts, in both North and Latin American communities, are relevant for discussion focused not only on development, but on many other aspects dealing with the evolution of the world, in particular the transatlantic world.

Problems affecting communities (such as poverty, inequality, racism, disorganization, lack of civic involvement, etc.) ultimately affect and influence the welfare and stability of regions, nations, continents and the international scene. The suggestion here was to analyze how communities respond to these problems and only then to explain the evolution of the international scene (and not the other way around). Accordingly, I attempted to show that the ways in which local communities' initiatives and solutions resist and respond to their problems have global consequences.

Ultimately, this may be taken as an invitation for a critical perspective on development and a reconsideration of local communities through the lenses of a post-developmental paradigm. As suggested by the authors and in the cases mentioned above, in many cases, the aspect of development is the least relevant and important for these communities. Why then to impose our external ideological idea and mechanism of development in their individual lives, social activities and businesses?

Escobar (1995) described development as a 'historically singular experience' with its own discourse that defines one as either 'developed' or 'underdeveloped'. He argues for the need to deconstruct this discourse and move toward what he calls 'hybrid cultures', or cultures fueled by seemingly opposite or distant elements. I illustrated through the cases above such hybridizations and intermediary positions and actors. Why not to apply this same paradigm in analyzing other seemingly irreconcilable positions, as well, such the North/South, civilized/uncivilized, prestigious/marginal, rich/poor, etc. dichotomies?

The increasing number of post-developmental approaches, illustrated and expressed by various resistant communities across the Americas, may suggest a reconsideration of not only these dualisms, but also of the American and Transatlantic studies toward the necessity of properly documenting and capturing the rich historical, social, economic, cultural and political contributions of these local communities as relevant scholarship to different analyses about values, ideologies, cultural heritages, economic practices, social-political mechanisms and global evolutions.

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